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NOS. 79-1404, 79-1408,
79-1414, 79-1415, 79-1489

IN THE SUPREME COURT OF THE
UNITED STATES

OCTODER TERM, 1980

In re Pennhurst Parents-
Staff Association,

Petitioner and Movant

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA OR, IN THE ALTERNATIVE, FOR MODIFICATION OF THIS COURT'S STAY ORDER OF JUNE 30, 1980

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QUESTIONS PRESENTED

1. Whether the interpretation and implementation by the United States District Court for the Eastern District of Pennsylvania of this Court's stay order of June 30, 1980 in Pennhurst State School and Hospital, et al v. Terri Lee Halderman, et al, Nos. 79-1404, 79-1408, 79-1414, 79-1415 and 79-1489, renders the issuance of a writ of mandamus and prohibition necessary and appropriate to assure that this Court's order is honored.

2. Whether the circumstances presented herein warrant modification and expansion of this Court's stay order of June 30, 1980. */

*/ The petition for writ of prohibition and mandamus seeks a writ directed to the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, and the motion for stay is directed toward the orders of that court. In addition, all of the petitioners and respondents in the Pennhurst cases may have an interest in this matter, and copies of this petition are being served on counsel for each.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement of the case	2
Summary of Argument	8
Argument	7
I. The Court's stay was intended to preclude court-ordered community placements until the Pennhurst case is resolved	9
II. The issuance of a writ of mandamus and prohibition is necessary and appropriate to enforce this court's earlier stay order	12
III. Alternatively, this Court should modify and expand its stay of June 30, 1980	14
Conclusion	18

APPENDIX

Appendix A - Order of United States District Court for the Eastern District of Pennsylvania, dated July 15, 1980

Appendix B - Memorandum opinion of United States District Court for the Eastern District of Pennsylvania, dated July 28, 1980

Appendix C - Affidavits in support

Appendix D - Report of the Hearing Master Re: Proposed Community Placement of G. W. (October 15, 1980) Report of the Hearing Master Re: Proposed Community Placement of P. T. (October 8, 1980).

TABLE OF AUTHORITIES

Cases	Page
Halderman v. Pennhurst State School & Hospital, 446 F.Supp. 1295 (E.D. Pa. 1978), aff'd in part, 612 F.2d 84 (3d Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980)	3, 5, 6
Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980)	3
United States v. Fossat, 21 How. 445 (1859)	13
Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425 (1979)	7, 13
Statutes:	
28 U.S.C. § 1651	1
Miscellaneous:	
Stern & Gressman, Supreme Court Practice, 5th Ed. 1978	13

OPINIONS BELOW

This petition for writ of mandamus and prohibition is necessitated by an order of July 14, 1980 issued by the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, purporting to interpret this Court's stay order of June 30, 1980 in the Pennhurst cases. The district court's order, and its subsequent explanatory opinion of July 29, 1980, are unreported, and are set forth in Appendices A and B, respectively. This Court's June 30, 1980 stay order is reported at 100 S.Ct. 3046 (1980).

JURISDICTION

Jurisdiction in this Court to grant the requested relief is found in the All Writs Statute, 28 U.S.C. § 1651, which provides in pertinent part as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

Petitioner Pennhurst Parents-Staff Association ("the Association") seeks a writ of mandamus and prohibition, compelling the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, to comply with this Court's order of June 30, 1980. That order stayed the court-ordered relocation of the mentally retarded residents of the Pennhurst Center for the Mentally Retarded ("Pennhurst") until resolution of the Pennhurst cases,

which raise basic questions concerning the propriety of such relief. [1/] This Court's stay is being circumvented by an artful district court interpretation effectively rendering the stay a nullity. [2/] The Court's exercise of jurisdiction through mandamus and prohibition is thus necessary and appropriate to give effect to its earlier stay order, and to preserve the status quo and prevent irreparable injury.

The questions now before the Court in the Pennhurst cases relate to the source and nature of the federal courts' authority to mandate the kind of care that states will provide for the mentally retarded. The Association and the other petitioners contend that the federal courts lack authority to enforce independent determinations compelling placement of the mentally retarded in "community living arrangements" ("CLAs"), as was authorized by the decision below, and that the courts below exceeded their lawful authority by ordering the Commonwealth of Pennsylvania and the Pennsylvania counties to establish and fund appropriate CLAs for Pennhurst residents.

As the Association's earlier Memorandum In Support Of Motion To Stay Orders Of The United States District Court

1/ The cases have not been scheduled for argument as of this date. Briefs for petitioners and respondents have been filed, however, and the Association has been advised that the cases are likely to be set for argument in early December, 1980.

2/ Since the basic question here presented relates to an interpretation of the Court's earlier stay, the Association has lodged with the Court copies of its papers in support of its earlier motion for stay. If the Court deems the district court's interpretation of its June 30, 1980 stay order to be correct, the Association submits that the circumstances presented in its earlier stay motion of June 20, 1980 and in the instant memorandum and related papers warrant an expansion of that stay order. See Part C, infra.

for the Eastern District of Pennsylvania (hereinafter "Association's Memorandum") indicated, the district court originally had ordered that Pennhurst be closed entirely. See Halderman v. Pennsylvania State School & Hospital, 446 F.Supp. 1295 (E.D. Pa. 1978), aff'd in part, Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980). Although the Third Circuit subsequently reversed that portion of the district court's ruling, it nevertheless held that deinstitutionalization is the "favored approach" and affirmed the appointment of a Special Master to monitor the creation of new CLAs for Pennhurst residents. It additionally ruled that an individual placement determination be made for each Pennhurst resident, and that all such determinations should reflect a "presumption that individviduals should be placed in CLAs." Halderman v. Pennhurst State & Hospital, 612 F.2d 84, 115 (3rd Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980). 3/

The ultimate result of the Third Circuit's decision was thus essentially the same as that of the district court. As the Association previously stated in seeking a stay of this process:

> "Obviously, such a massive bureaucratic structure [as that required by the decisions below] guided by a presumption favoring community placement of mentally retarded individuals and authorizing the court-appointed Special Master to propose CLAs will press inevitably to community placement in individual cases.

3/ On remand, the district court appointed a second master, called a hearing master, to conduct hearings concerning the appropriate placement of Pennhurst residents in CLAs and to implement the presumption in favor of community care.

* * * * *

> "[W]hile the District Court's initial absolute rule was replaced by the Third Circuit's presumption, the facts demonstrate that the result is the same. Absent this Court's intervention, a substantial number of retarded individuals will be forced into community living arrangements that are not equipped to care for them before the case is resolved in the 1980 Term." Association's Memorandum, at 10, 13.

In response to the Association's earlier stay motion, this Court issued the following order on June 30, 1980:

> "Petitioners' motion for a stay of the judgment of the Court of Appeals pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements.' In all other respects, the motion is denied. Mr. Justice Brennan, Mr. Justice Marshall, Mr. Justice Blackmun and Mr. Justice Powell would deny the motion." 100 S.Ct. 3046 (1980). 4/

Properly interpreted in the context in which the Association's motion was presented and resolved, this Court's order required the district court to refrain from ordering the Commonwealth of Pennsylvania and the county defendants to place Pennhurst residents in community living arrangements pending this Court's review of the Third Circuit's decision. Subsequent events demonstrate that this mandate is being ignored.

On July 14, 1980 the district court issued an order purporting to interpret the significance of this Court's stay order and outlining procedures to be followed by the court-appointed hearing master in determining whether

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4/ The Association did not seek a stay of those portions of the district court's orders that related to improvements of the Pennhurst facility. To the contrary, the Association's basic position is that state and federal funds should be used for that purpose. Indeed, one of the Association's key objections to the procedures ordered by the district court is that the massive bureaucracy drains needed funds that might otherwise be used to improve Pennhurst.

Pennhurst residents should be placed in CLAs in individual cases. See Appendix A. hereto. In a subsequent memorandum opinion, the district court explained that it interpreted this Court's order to leave intact its earlier order that the Commonwealth of Pennsylvania and the county defendants provide individualized community living arrangements for present and future Pennhurst residents. See Appendix B hereto. Moreover, according to the district court, this Court's stay order allowed it to continue to require hearings to determine in individual cases whether Pennhurst residents wished "voluntarily" to be transferred to the community living arrangements that were being offered pursuant to court order.

In light of the district court's decision, the Commonwealth of Pennsylvania and the counties continue to be ordered to provide CLAs for individual Pennhurst residents, and the court-ordered bureaucracy continues to press forward for community placement. In recent months, a hearing master appointed by the district court has conducted hearings in some 17 cases, and in all but one case has ordered placement of the Pennhurst resident in the CLA to which he or she had been designated or interim measures designed to facilitate such community placements. See Affidavit of Pamela P. Cohen, Esquire, Appendix C hereto. Moreover, although the initial hearings involved Pennhurst residents whose transfer to the CLA in question was not opposed by their parents or guardians, 5/ the hearing master recently has concluded one hearing in which both parents strongly objected to placement of their profoundly retarded child in a CLA by determining

5/ In many instances, the Pennhurst resident did not have a parent or guardian to express an objection.

that the transfer was "voluntary" because, in his opinion, the profoundly retarded 19 year old in question would have opted for placement in the CLA if he were competent to speak for himself. See Report of The Hearing Master Re: Proposed Community Placement of G. W., Appendix D, hereto.

SUMMARY OF ARGUMENT

The district court's interpretation of this Court's stay order of June 30, 1980 is in error. It renders that order a virtual nullity, thereby depriving the Association's members of the important interim protections that the Court intended to confer. This Court's order was clearly intended to prohibit court-ordered relocation of Pennhurst residents until after the decision in the Pennhurst cases. The district court's imposition of a "voluntariness" inquiry is a meaningless diversion, and does not mitigate the fact that that court and the bureaucracy it has created are acting in clear contravention of this Court's stay order of June 30, 1980. Accordingly, this is an instance in which the lower court has mistaken or misconstrued this Court's mandate, and where the exercise of a writ of mandamus and prohibition is necessary to assure compliance with the Court's order. Cf. Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427-428 (1978).

ARGUMENT

This Court will soon hear oral argument in the Pennhurst cases, which present broad-ranging questions related to the

federal courts' authority to order the displacement of mentally retarded individuals from Pennhurst. The position of the Association and the other petitioners in that case is that neither federal law nor the laws of the Commonwealth of Pennsylvania establish a right to "appropriate treatment" in "the least restrictive environment" for the developmentally disabled that can be enforced through private litigation, and that the district court lacked the authority to require the Commonwealth and the Pennsylvania counties to provide CLAs and appoint a master to determine the appropriate community placement for each current and potential Pennhurst resident. If that position is accepted, all of the substantial dislocation that is presently underway pursuant to court order will have been unauthorized. Unfortunately, however, much of that dislocation may be irreversible.

A. The Court's Stay Was Intended To Preclude Court-Ordered Community Placements Until The Pennhurst Case Is Resolved.

The basic question presented by this petition relates to the intended scope of the Court's stay order of June 30, 1980. If the Association's interpretation of the Court's order is correct, the issuance of a writ of mandamus and prohibition necessarily should follow. The same irreparable injury that prompted issuance in the stay in the first instance certainly mandates that it be complied with now.

As the Association's Memorandum indicated, the district court has established a large and expensive bureaucracy, designed to replace Pennhurst with a system of dispersed CLAs throughout Pennsylvania. See Association's Memorandum, at 7-10. The entire bureaucratic process tilts inevitably

toward placement of Pennhurst residents in CLAs, since it is guided by the Third Circuit's presumption favoring community placement, and since the district court's procedures require that anyone opposing community placement establish that Pennhurst would be more beneficial than the particular CLA that has been selected and funded prior to the time of the hearing. The Association further pointed out that the court-ordered bureaucracy would exact considerable displacement and cost substantial sums of money that might better be used for improving Pennhurst rather than destroying it. Finally, affidavits submitted in support of the Association's stay motion illustrated that the district court's bureaucracy had exacted a substantial toll in human terms as well, and that it threatened to continue to exact such a price if not stayed pending the Court's consideration of the legal foundation on which it rests.

The Association's stay motion was directed at specified portions of the district court's orders designed to establish mechanisms for the replacement of Pennhurst with a system of CLAs. Thus the Association sought a stay of the portions of the district court's order of March 24, 1978, as amended, that required the Commonwealth of Pennsylvania and the counties to provide suitable community living arrangements for Pennhurst residents, and that established the Office of the Special Master. The remaining portions of the district court orders sought to be stayed likewise related to the transfer of Pennhurst residents to CLAs and to the court-ordered bureaucracy created to implement that goal. The Association also sought a stay "of all future orders of the

district court insofar as they relate to the transfer of people from Pennhurst and/or to the utilization of the Special Master . . . ."

This Court chose to cast its stay order in broad terms rather than deal with the specific details of the Association's requested relief. Thus, the Court's order stayed the judgment of the court of appeals "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements,'" and stated that "[i]n all other respects," the Association's motion was denied. The question here is what the Court meant by its stay order. Clearly, there is only one answer: the Court intended to stop all judicially-ordered transfers of Pennhurst residents until it could decide whether the federal courts have the authority to order such relief.

The district court's determination that this Court's order was designed only to stay those transfers that are not "voluntarily" accepted by the Pennhurst resident renders the stay essentially meaningless, and leaves intact the massive bureaucracy that pushes steadily to dismantle Pennhurst while questions regarding the legality of that process remain to be decided. Virtually all of the judicial compulsion remains, and the "voluntariness" hearings at the end of this process are nothing more than cumbersome charades in which the master's determination whether the Commonwealth and county defendants have satisfied the court's order to provide a suitable CLA is disguised in terms of whether a mentally incompetent person would "voluntarily" accept that CLA if he or she could voice an opinion in the matter.

The district court itself has earlier acknowledged that "voluntariness" is a meaningless concept in this context, 6/ and experience has proven him correct. In virtually all cases, the hearing master is forced to speculate on this issue, since the profoundly retarded residents of Pennhurst cannot understand the issue, much less voice such judgments for themselves. The hearing master makes these determinations after a cumbersome and expensive hearing, obviously involving considerable trauma to the opposing parents. Moreover, recent proceedings conducted by the hearing master are rendered even more absurd by his practice of appointing counsel who represents the plaintiff class below to "represent" the views of the Pennhurst resident and oppose the position of that resident's parents. See Report of the Hearing Master Re: Proposed Community Placement of G. W., Appendix D, at 4-5; Report of the Hearing Master Re: Proposed Community Placement of P. T., Appendix D, at 3-4; Affidavit of Pamela P. Cohen, Esquire, Appendix C hereto. 7/

6/ The district court has earlier expressed the view that, due to the mental disabilities of many Pennhurst residents, "the notion of voluntariness in connection with admission as well as in connection with the right to leave Pennhurst is an illusory concept." Halderman v. Pennhurst State School & Hospital, 446 F.Supp. 1295, 1311 (E.D.Pa. 1978), aff'd. in part 612 F.2d 84 (3d Cir. 1979), cert. granted, 100 S.Ct. 2984 (1980). It is hard to understand why the notion of "voluntariness" is any more real a concept when used to determind whether a Pennhurst resident might wish to be transferred to a CLA, and the district court's order and memorandum opinion fail to provide any explanation in that regard.

7/ For example, the hearing master appointed David Ferleger, Esquire to "represent" the profoundly retarded Pennhurst resident in the G. W. hearing. The Pennhurst resident could not understand the issues at stake in the hearing, however, and was only able to attend a portion of those hearings. Thus, Mr. Ferleger's "representation" of the Pennhurst resident's position was and could be nothing more than advocacy for the community placement of the Pennhurst resident, and continued support for the Third Circuit's presumption favoring community placement for all Pennhurst residents. Indeed, (cont. next page)

Equally important, the district court continues to order the Commonwealth of Pennsylvania and the counties to develop and fund CLAs for present and prospective Pennhurst residents, and valuable resources continue to be drained to support an illegal court-ordered bureaucracy whose essential role is to replace the Commonwealth, the counties and the parents as the decisionmakers in this difficult area. The judicial coercion the Association challenged in its initial stay motion thus remains: State and county officials are compelled to work toward community placement of all present and future Pennhurst residents, and Pennhurst residents are being railroaded in that direction over the objection of their parents.

B. The Issuance Of A Writ Of Mandamus And Prohibition Is Necessary And Appropriate To Enforce This Court's Earlier Stay Order.

The precise relief sought in this case is a writ of mandamus and prohibition, directed to the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, compelling that court's compliance with this Court's earlier stay order. In view of the history

(cont. from previous page) the hearing master instructed Mr. Ferleger to "advocate for G. W.'s wishes insofar as they could be determined, and otherwise be guided by the presumption in this case in favor of placing mentally retarded persons in the community . . . ." Report of The Hearing Master Re: Proposed Community Placement of G. W., Appendix D, at 4-5. Moreover, the master ordered the Commonwealth to pay for this "representation."

Since Mr. Ferleger has sumitted a brief in this Court maintaining that Pennhurst should be closed entirely, it is hardly surprising that he offers vigorous advocacy in favor of community placement. His basic function throughout the hearing was to oppose the parents' position and attempt to diffuse parental objection to their son's placement in the CLA to which he has been assigned.

of this matter, the Association respectfully submits that any new order from this Court should, at a minimum, specifically state the following:

1. That the district court's orders compelling the Commonwealth of Pennsylvania and the county defendants to provide suitable community living arrangements for all present and potential Pennhurst residents are stayed pending this Court's final disposition of the review of the Third Circuit's decision;

2. That the district court should require that all activities of the special master and the hearing master implementing the district court's mandate that Pennsylvania and the county defendants provide suitable community living arrangements for present and potential Pennhurst residents likewise be stayed for this period of time. 8/

Relief of this kind is necessary and appropriate to aid this Court's jurisdiction. Cf. 28 U.S.C. § 1651. Certainly nothing is more fundamental to this Court's jurisdiction than that its orders be obeyed and not circumvented by artful interpretation. Moreover, as the Court recently stated, mandamus "is available to a party who has prevailed in this Court if the lower court 'does not proceed to execute the mandate, or disobeys and mistakes its meaning . . . .'" Vendo Co. v. Lektro-Vend Corp., supra, 434 U.S. at 427,

8/ The Commonwealth of Pennsylvania and the county defendants would remain free to offer suitable community living arrangements for individual Pennhurst residents, if, in their unfettered judgment, that is appropriate. The difference, however, would be that the basic judgments on these issues would be returned to the Commonwealth, the counties and the concerned parents until this Court resolves questions relating to the federal court's authority to displace them in that regard.

quoting United States v. Fossatt, 21 How. 445, 446 (1859); see also Stern & Gressman, Supreme Court Practice (5th ed. 1978), at 630-632, and cases cited therein. This is an appropriate case for the exercise of this Court's powers. 9/

The same considerations that prompted this Court to grant the stay in the first instance militate even more forcefully for additional relief to assure that the order is honored. The irreparable injury justifying the initial stay is still present, and events have proven that the threats spelled out in the Association's initial stay motion are real and not imaginary. Indeed, circumstances warranting the stay are even more compelling now than before; not only have the injuries identified in the Association's earlier motion continued, this Court's order has been effectively ignored.

9/ The Association unsuccessfully opposed the district court's interpretation of this Court's order below, but it did not feel compelled to seek correction of that decision under it could assess the impact of that decision as it affected the interests of the Association and its members. That impact is now clear, particularly since the hearing master has now begun to order community placement of the children of Association members. The Association's position in the District Court was that this Court's stay orders prohibited all transfers from Pennhurst. The Commonwealth of Pennsylvania urged that this Court's order prohibited court-ordered transfers only, and that the Commonwealth remained free to transfer Pennhurst residents if, in its independent view, that was considered to be appropriate. On reflection, the Association agrees that the Commonwealth's interpretation is the correct one, and that is the position it urges here. Since this position has been explicitly rejected by the district court, it would be futile to renew the Association's modified position in that forum. Furthermore, since the basic question here presented relates to the proper interpretation of an order of this Court, the Association feels that the proper action is to bring the issue to this Court rather than to the Court of Appeals. The district court's erroneous interpretation of this Court's order does not relate to the jurisdiction of the Court of Appeals, cf. 28 U.S.C. §1651, and thus that court cannot grant the requested relief. Cf. Rule 27.2(a), Supreme Court Rules

C. Alternatively, This Court Should Modify And Expand Its Stay Of June 30, 1980.

If the district court's interpretation of the intended scope of this Court's order of June 30, 1980 is correct, the Association respectfully submits that the Court should reconsider that order and expand it to specifically stay the portions of the district court's orders that are identified in the Association's stay motion of June 20, 1980, which has been lodged together with this petition. In addition, the Court should stay the district court's recent order of July 14, 1980.

The Association's earlier Memorandum urged that a stay was required in order to preserve the status quo until this Court resolved issues related to the federal courts' power to require the kinds of sweeping remedial relief here at issue. E.g., Association Memorandum at 1,3. That necessity remains; the attached affidavit of Pamela Cohen, Esquire confirms that the court-ordered bureaucracy continues to work to place Pennhurst residents in CLAs. To date, a hearing master acting under powers conferred by the district court's orders has conducted hearings in some 17 cases. In all but one of those cases, the hearing master, purporting to act under the fictional "voluntariness" standard, has ordered placement of the Pennhurst resident in a CLA, or has ordered intermediate steps toward that end. In only one case has the hearing master determined that the Pennhurst resident's transfer to a CLA would not be "voluntary," and

even then he ordered continued efforts to resolve the parents' objections to the CLA at issue.

The Association's earlier memorandum also noted that the bureaucracy and procedures ordered by the district court would cost substantial sums of money that cannot be recovered in the event this Court determines the entire process to be unauthorized. Association Memorandum at 9-10. That injury likewise continues; the Commonwealth and the county defendants are still being ordered by the district court to provide suitable community living arrangements for present and future Pennhurst residents, and they continue to be compelled to expend funds for that purpose and to fund the court-ordered special master and hearing master and their staffs. To date, the Commonwealth's expenditures related to the special master's and hearing master's offices exceed some $1.8 million, and the Commonwealth anticipates continuing monthly expenses of some $60,000 for the special master's activities and some $10,000 for those of the hearing master. See Affidavit of Pamela P. Cohen, Esquire, Appendix C. Thus, funds that might otherwise be devoted to improving Pennhurst are instead continuing to be used to support a court-ordered bureaucracy that is dedicated to its dismemberment.

Finally, the Association earlier pointed out that the entire community placement process would exact a devastating toll on the persons involved. In the Association's view,

those fears are being confirmed. Indeed, one Association member who submitted an affidavit stating that she feared that her son would be transferred to a CLA over her objections has now seen that threat materialize. See; Affidavit of Carol Yarrow, contained in Appendix C hereto; Report of the Hearing Master Re: Proposed Community Placement of G. W., contained in Appendix D, hereto. This member has now participated in a traumatic hearing before the hearing master, only to find that her views, and the views of her former husband, were to be ignored because the hearing master concluded that their son would have ignored those views himself if he were competent to reach that judgment.

The so-called "voluntariness" hearings are a facade, consisting of nothing more than the hearing master's attempt to assure himself that the particular CLA is adequate for the Pennhurst resident. See generally Reports of the Hearing Master Re: Proposed Community Placements of G. W. and P. T., which are set forth in Appendix D hereto. As the hearing master has acknowledged, he personally favors community placement, see Report of the Hearing Master Re: Proposed Community Placement of G. W., at 6, and he presumes that each community placement is voluntary "in the absence of any indication to the contrary." Id., at 12. As an examination of the opinions in the two opposed cases will confirm, the hearing master gives the parents' views variable weight, depending on the extent to which they happen to suit his particular views. Finally, even in the one case in which the hearing master found the proposed transfer to be "involuntary" he ordered relief that is obviously designed to precipitate a second

hearing in which the proposed transfer can be found to be "voluntary." See Report of the Hearing Master Re: Proposed Community Placement of P. T., Appendix D, at 23-24. The court-ordered bureaucracy presses forward toward the inevitable community placement of Pennhurst residents.

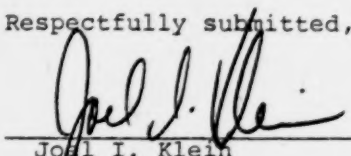
In sum, events have proven that clearly delineated relief is necessary to protect against the injuries spelled out in the Association's earlier motion for stay. The Association urges, therefore, that, if a writ of mandamus and prohibition does not issue, the Court should issue a modified stay in conformity with the Association's motion of June 20, 1980, and that the Court likewise stay the July 14, 1980 order of the United States District Court for the Eastern District of Pennsylvania that is set forth in Appendix A hereto.

CONCLUSION

For the reasons set forth herein, the Pennhurst Parents-Staff Association respectfully urges that a writ of mandamus and prohibition issue to the Honorable Raymond J. Broderick, United States District Court for the Eastern District of Pennsylvania, compelling that court's compliance with this Court's order of June 30, 1980. In the alternative, the Association requests that this Court stay the district

court's order of July 14, 1980, and that the Court modify its previous order of June 30, 1980 to grant the full relief previously requested by the Association on June 20, 1980.

Respectfully submitted,



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APPENDIX A: Order of the United States District Court for the Eastern District of Pennsylvania of July 14, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.,	:	
Defendants	:	
UNITED STATES OF AMERICA,	:	
Plaintiff-Intervenor	:	FILED JUL 15 1980
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,	:	
Plaintiffs-Intervenors	:	NO. 74-1345

O R D E R

AND NOW, this 14th day of July, 1980, the Supreme Court of the United States having on June 9, 1980 granted certiorari in the above captioned case, and having on June 30, 1980 entered the following limited stay Order:

> Petitioners' motion for a stay of the judgment of the Court of Appeals, pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to "appropriate community living arrangements." In all other respects, the motion is denied.

this Court hereby ORDERS that no resident of Pennhurst shall be transferred to a community living arrangement in accordance with prior Orders of this Court unless and until the Hearing Master has determined that such transfer is voluntary. The Hearing Master shall schedule a hearing for each Pennhurst resident for whom a community living arrangement has been prepared, for the purpose of determining whether the transfer is voluntary. The Hearing

ENTERED: 7/15/80

CLERK OF COURT

Master shall give five (5) days notice of such hearing to the Pennhurst resident; parent, guardian or certified advocate; county; Commonwealth; and Special Master. The Hearing Master shall prepare a report setting forth his findings as to whether the transfer is voluntary, which report shall be filed with the Court and sent to all parties within five (5) days of the conclusiong of the hearing. If the Hearing Master finds that the transfer is not voluntary, the arrangements for transferring the resident to the community shall be terminated pending further ruling by the United States Supreme Court.

RAYMOND J. BRODERICK, J.

APPENDIX B: Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania, July 29, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.,	:	
Defendants	:	
UNITED STATES OF AMERICA,	:	
Plaintiff-Intervenor	:	FILED JUL 29 1980
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,	:	
Plaintiffs-Intervenors	:	NO. 74-1345

MEMORANDUM

BRODERICK, J. July 29 , 1980.

On June 9, 1980, the Supreme Court granted certiorari to review the judgment of the Court of Appeals in this case. Plaintiffs-intervenors the Pennhurst Parents Staff Association filed a motion for a stay in the Supreme Court requesting the Supreme Court to stay the following:

> 1. A stay of paragraphs 1-11 of the order of March 24, 1978, as amended, in their entirety.
>
> 2. A stay of paragraphs 12-20 of that order insofar as those paragraphs require or depend on the Special Master and other personnel and procedures established by that order.
>
> 3. A stay of the district court's order of March 5, 1979, as amended, insofar as it requires or depends on the Special Master and other personnel and procedures established by the district court's order.
>
> 4. A stay of the district court's order of June 8, 1979, as amended, in its entirety.

ENTERED: 7/30/80

CLERK OF COURT

5. A stay of section V of the April 24, 1980 order in its entirety.

6. A stay of all future orders of the district court insofar as they relate to the transfer of people from Pennhurst and/or to the utilization of the Special Master, including but not limited to the district court's proposed order of May 20, 1980.

On June 30, 1980, the Supreme Court entered the following Order:

> Petitioner's motion for a stay of the judgment of the Court of Appeals, pending final disposition of the cases in this Court, is granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to "appropriate community living arrangements." In all other respects, the motion is denied.

Pursuant to the Supreme Court's stay order, this Court on July 14, 1980 ordered that:

> . . . no resident of Pennhurst shall be transferred to a community living arrangement in accordance with prior Orders of this Court unless and until the Hearing Master has determined that such transfer is voluntary. The Hearing Master shall schedule a hearing for each Pennhurst resident for whom a community living arrangement has been prepared, for the purpose of determining whether the transfer is voluntary. The Hearing Master shall give five (5) days notice of such hearing to the Pennhurst resident; parent, guardian or certified advocate; county; Commonwealth; and Special Master. The Hearing Master shall prepare a report setting forth his findings as to whether the transfer is voluntary, which report shall be filed with the Court and sent to all parties within five (5) days of the conclusion of the hearing. If the Hearing Master finds that the transfer is not voluntary, the arrangements for transferring the resident to the community shall be terminated pending further ruling by the United States Supreme Court.

On July 14, 1980, this Court also ordered that it would "hold a hearing, receive memoranda and hear oral argument . . . for the purpose of determining whether the aforementioned Supreme Court Order stays any prior Order of this Court, except as recognized in the Order of this Court dated July 14, 1980 in connection with determinations as to voluntariness of transfers from Pennhurst to Community Living Arrangements." The hearing was held on July 21, 1980; all parties presented argument, and briefs were submitted by

the plaintiffs, the Parents-Staff Association, and the Commonwealth.

Plaintiffs-intervenors the Pennhurst Parents-Staff Association argue that the Supreme Court stay bars all movement of residents from Pennhurst, whether voluntary or involuntary. They further argue that all planning for community placement of Pennhurst residents is also stayed.

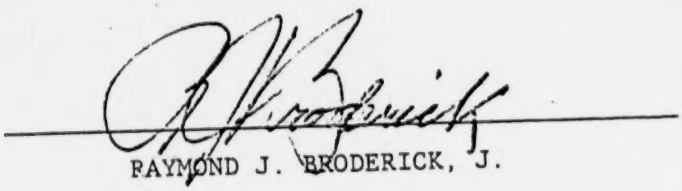
The Commonwealth and Counties take a slightly different position. They concede that this Court retains authority to monitor the conditions at Pennhurst, and to continue the services of the Special Master in that process. Unlike the Parents-Staff Association, the Commonwealth and Counties do not contend that residents who wish to leave Pennhurst are condemned to remain there for the period of the Supreme Court stay. They argue, however, that the stay has removed the authority of this Court to exercise any control over such voluntary placements. They further contend that this Court's Order of July 14, 1980 in connection with determinations as to the voluntariness of transfers violates the Supreme Court stay order. The Commonwealth, which did not join the motion for stay in the Supreme Court, believes that it and the Counties have exclusive authority over community placements as a result of the Supreme Court stay.

Original plaintiffs and plaintiff-intervenor Pennsylvania Association for Retarded Citizens agree that the only modification of this Court's prior Orders necessitated by the Supreme Court stay was accomplished by this Court's Order of July 14, 1980 regarding the voluntariness of transfers. In other words, they interpret the Supreme Court stay as barring only involuntary transfers from Pennhurst to appropriate community living arrangements.

The Court finds the plaintiffs' arguments concerning the Supreme Court stay to be the most persuasive. There is absolutely no support for the Parents-Staff Association's position that the

Supreme Court intended to close the doors of Pennhurst, forbidding anyone to leave. As to the position of the Commonwealth and Counties that voluntary transfers may proceed, but that this Court has no authority in connection with such transfers, we must look to the motion for stay and the precise wording of the Supreme Court's Order. The motions sought a stay of paragraphs 1 through 11 of the Order of March 24, 1978, as amended, which set forth specific procedures for the planning, development, and monitoring of community living arrangements. A stay of the Order of June 8, 1979, which provided specific steps for transferring the school-age residents of Pennhurst to the community, was also sought. Further, the Parents-Staff Association sought to stay Part V of the Order of April 24, 1980, which provided for individual determinations as to the appropriate habilitation for Pennhurst residents, as mandated by the Court of Appeals for the Third Circuit. If the Supreme Court had intended to terminate the involvement of this Court in the voluntary movement of Pennhurst residents to the community, it could easily have done so by specifically granting the three stay requests. Instead, the Supreme Court granted a stay of the judgment of the Court of Appeals only "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements.'" We understand the word "mandate" to have its literal meaning -- that this Court cannot mandate the movement of residents from Pennhurst to the community. Nothing in the Supreme Court stay order suggests, however, that voluntary transfers may not proceed, nor that this Court may not ensure that residents and their families make informed judgments as to such voluntary placements. Furthermore, we find nothing in the Supreme Court stay order to prevent this Court, with the assistance of its Special Master and Hearing Master, from ensuring that such voluntary transfers make adequate provision for the safety and habilitation of the retarded

residents. The Court therefore sees no need to further modify its Orders as a result of the Supreme Court stay order.



RAYMOND J. BRODERICK, J.

APPENDIX C: Affidavits In Support of Petition or Motion.

IN THE SUPREME COURT
OF THE UNITED STATES
1980 TERM

In re: PENNHURST PARENTS-STAFF ASSOCIATION	)	Nos. 79-1404
	)	79-1408
	)	79-1414
	)	79-1415
	)	79-1489

AFFIDAVIT OF CAROL YARROW IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS AND PROHIBITION
OF, ALTERNATIVELY, MODIFICATION OF STAY

CAROL YARROW, being duly sworn, deposes and says:

1. I am a member of the Pennhurst Parents-Staff Association, which is a petitioner in the Pennhurst cases presently before the Supreme Court and the petitioner in this petition for writ of mandamus and prohibition.

2. My son, Gregory, is 19 years old. He is severely mentally retarded and blind, and has an intellectual age of approximately 18 months. Gregory is hyperactive, aggressive and self-abusive and requires heavy medication and constant supervision. In my opinion, Gregory is unable to understand the issues at stake in this case, or to rationally determine whether his interests would be best served by remaining in an improved Pennhurst or being placed in a court-ordered community living arrangement (CLA).

3. In June of 1980, I submitted the attached affidavit in support of the Association's motion for a stay of certain orders of the United States District Court for the Eastern District of Pennsylvania designed to move residents of Pennhurst to individual community living arrangements (CLAs).

4. In that affidavit, I expressed my personal concern that my son would be forced into a CLA that was not adequate to care for him, notwithstanding my opposition.

5. My previous affidavit also expressed my opinion that the result of the structures established by the district court would inevitably be to place my son in a CLA that was inadequate to meet his needs in spite of my views.

6. Although I had hoped and understood that the Supreme Court's order of June 30, 1980 would halt that process until the Supreme Court decides the Pennhurst cases, that has not been the result of the Supreme Court's order.

7. In September of 1980, a hearing master appointed by the district court conducted hearings for approximately 3 days regarding the placement of my son in the CLA to which he had been assigned pursuant to the district court's orders.

8. I and my former husband appeared, represented by counsel, and opposed our son's placement in this CLA for a number of reasons. I particularly opposed our son's transfer to the CLA prior to the Supreme Court's decision in the Pennhurst cases, for I believe that such a disruptive change should not be forced upon my son unless it is clear that the federal courts have the authority to order such measures.

9. Over our objections, the hearing master appointed one of the attorneys who represents the class of plaintiffs that is attempting to close Pennhurst, purportedly to represent our son's viewpoint in this proceeding. The hearing master ruled that the cost of that representation was to be borne by the Commonwealth of Pennsylvania, and denied our motion for a similar compensation award for our counsel.

10. Throughout the hearing, the attorney who purportedly represented our son challenged the validity of my views and the views of my former husband regarding our son's welfare, and argued in favor of his placement in the designated CLA.

11. At the close of the hearing, the hearing master ruled that my son's placement in the designated CLA was

"voluntary" because the hearing master believed that my son would opt for placement in that CLA if he were able to speak for himself. The hearing master ordered that my son begin initial visits at the CLA as a prelude to a final order permanently placing him in the CLA. Moreover, the hearing master indicated that he thought it most unlikely that the information obtained in these preliminary visits would alter his opinion regarding the "voluntariness" of my son's placement in the CLA. My counsel has filed exceptions to this ruling.

12. Based on this experience, I can state that the Supreme Court's order of June 30, 1980 has offered no relief in my case at all, and that the consequences that I identified in my earlier affidavit are occurring, notwithstanding that order.

Carol Yarrow

Sworn to and subscribed
before me this 30 day of
October, 1980.

GEORGE D. MADONNA

OCT 30 1980

Notary Public

NOTARY PUBLIC
933 Springfield Rd., Darby, Pa. 19023
My Commission Expires March 26, 1981

IN THE SUPREME COURT
OF THE UNITED STATES
1980 TERM

In re: PENNHURST PARENTS-STAFF ASSOCIATION	)	Nos. 79-1404
	)	79-1408
	)	79-1414
	)	79-1415
	)	79-1489

AFFIDAVIT OF PAMELA P. COHEN IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION OF, ALTERNATIVELY, MODIFICATION OF STAY

PAMELA P. COHEN, being duly sworn, deposes and says:

1. I am a member of the law firm of Swenson & Cohen. Since I have represented the Pennhurst Parents-Staff Association in litigation related to the Pennhurst Center for the Mentally Retarded. In addition, I have represented parents of Pennhurst residents in proceedings conducted as a result of orders issued by the United States District Court for the Eastern District of Pennsylvania in that case.

2. To date, the Hearing Master appointed by the District Court has held seventeen (17) hearings to effectuate "voluntary" placements of Pennhurst residents in community living arrangements established as a result of the District Court's Orders in the Pennhurst case.

3. Twelve (12) proposed placements were found by the

Hearing Master to be voluntary and prompt placement in the CLA was ordered. In four (4) additional proposed placements, the counties were instructed to make further preparation so that the placements can then be declared "voluntary". Even in the one instance where the propo lacement was found to be involuntary, the county was instructed to spend an additional ninety (90) days attempting to convince the resident's parents to withdraw their opposition to the placement.

4. In two hearings, I have represented parents of Pennhurst residents who oppose the placement of their sons in the designated CLA. I represent Carol Yarrow, an affiant in this proceeding, in one such hearing process.

5. In each opposed case, the Hearing Master appointed counsel purportedly to represent the Pennhurst resident and ordered that those counsel be compensated by the Commonwealth of Pennsylvania.

6. In each case, the counsel appointed to "represent" the Pennhurst resident was counsel of record for the class that seeks to have Pennhurst closed, and in each case that counsel vigorously opposed the position taken by the resident's parents in the proceeding.

7. In each case, the Hearing Master denied my motions to remove appointed counsel on the grounds of bias and on other grounds, and also denied my motions to be compensated on the same basis as were the counsel appointed to "represent" the Pennhurst resident.

8. In Carol Yarrow's case, the Hearing Master ruled that placement in a CLA was "voluntary", notwithstanding the expressed opposition of Mrs. Yarrow and her former husband, the father of the child in question, I have filed exceptions to that ruling on the parents' behalf.

9. In the other opposed case, the Hearing Master ruled that placement in the CLA was not "voluntary" due to the unresolved nature of certain parental objections. The Hearing Master ordered the county to reserve a place in the designated CLA for ninety (90) days, however, and to work with the Pennhurst resident's parents to resolve their objections.

10. I understand that the Commonwealth of Pennsylvania has already been required to pay approximately $1.8 million for operation of the Special Master's office, and approximately $60,000.00 for the operation of the Hearing Master. I further understand that Pennsylvania has anticipated continuing monthly

expenditures of approximately $62,000 and $9,900 for the operations of the Special Master and Hearing Master for the remainder of this year.

Pamela P. Cohen

PAMELA P. COHEN

Sworn to and subscribed before
me this 31 day of October, 1980.

Sondra S. Katz

Notary Public

SONDRA S. KATZ
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 5, 1983

APPENDIX D: Reports of the Hearing Master In Opposed Cases -

a. Report of the Hearing Master Re: Proposed Community Placement of G. W. (October 15, 1980)

b. Report of the Hearing Master Re: Proposed Community Placement of P. T. (October 8, 1980)

HEARING MASTER
Halderman v. Pennhurst
UNITED STATES DISTRICT COURT

Re: Proposed Community Placement Of G.W.

No. 80-P-16
(Civ. Act. No. 74-1345)

REPORT OF THE HEARING MASTER

1. Procedural History

On September 10, 1980, the Hearing Master received from the MH/MR Administrator of Chester County a notice of a proposed community placement of G.W., a resident of Pennhurst, dated September 9, 1980. Pursuant to the Order of July 14, 1980, the Hearing Master, on September 10, 1980, notified G.W., his parents, his certified advocate, Chester County, the Commonwealth, and the Special Master of a hearing to be held in the Hearing Master's office on September 18, 1980, to determine the voluntariness of the proposed transfer of G.W. from Pennhurst to a community living arrangement in Chester County. At the request of parents' counsel, the hearing was rescheduled for September 29, 1980, and was held on that date and on September 30 and October 7, 1980.

The hearing was attended by G.W. (first day only) and David Ferleger, Esq., the attorney appointed for him by the Hearing Master's order of September 22, 1980; by G.W.'s certified advocate, Jeanette Goldberg; by G.W.'s parents, R.W. and Mrs. C.Y., and their attorney, Pamela P. Cohen, Esq.; and by the County and the Office of the Special Master. In addition, although the Commonwealth has declined to participate voluntarily as a party to these proceedings (see Deputy Secretary Howse's letter to me of September 5, 1980), the Regional Commissioner of Mental Retardation, Dr. Russell Rice, appeared pursuant to subpoena on September 29 and 30,

1980, along with his attorneys, Stanley Slipakoff, Esq. (first day), and Jules Henshell, Esq. (second day). Dr. Rice was excused from further attendance at the hearing when a tentative agreement was reached during the second day as to attendance of Commonwealth witnesses in this and other cases. */

2. Preliminary Matters

A number of motions were made and ruled upon at the outset of the hearing, and their disposition will be included here as part of the Hearing Master's report. First, G.W.'s parents moved (with the Commonwealth's concurrence) to terminate the hearing as being in violation of the partial stay granted on June 30, 1980, by the United States Supreme Court in Halderman v. Pennhurst State School and Hospital. This motion was denied on the ground that the Hearing Master, even if he were so inclined, lacks the authority to overrule the District Court's Order of July 14, 1980, which requires hearings to determine the voluntariness of each proposed transfer of a Pennhurst resident to a community living arrangement.

The parents then moved, with the support of the Commonwealth, to dismiss Mr. Ferleger as the attorney for G.W. in this matter,

---

*/ Dr. Rice's presence was required by the Hearing Master's standing order of September 15, 1980, as well as by a subpoena served on behalf of the Office of the Special Master pursuant to that order. While the issue which occasioned the Hearing Master's standing order -- the Commonwealth's refusal to participate in my hearings, even to the extent of making witnesses available on short notice when needed -- was apparently resolved during the pendency of this matter, final resolution awaits written confirmation of the Commonwealth's position. The delay in this promised confirmation is becoming a matter of some concern to the Hearing Master.

on the basis that the Hearing Master has no authority to appoint counsel for Pennhurst residents in these proceedings. The Hearing Master disagrees. Whatever may be the import of the reference to retention or provision of attorneys in the Order of April 24, 1980, at 65, and whatever may be the obligation of the Commonwealth thereunder, the Hearing Master believes he has the authority to appoint counsel under Rule 53(c), F.R.Civ.P., which states in relevant part that

> . . . the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order [of reference].

In the instant case, where two other parties to the hearing are represented by counsel, the Hearing Master believes appointment of an attorney for the Pennhurst resident is necessary to ensure a balanced presentation of the issues and a proper recognition of the resident's separate legal interest.

The Commonwealth also contended that the presence of a certified advocate for G.W. in this case made appointment of counsel unnecessary. While this argument has some theoretical appeal, in practice the Hearing Master has found that the certified advocates appointed for certain class members in Halderman v. Pennhurst cannot provide the same level of representation as attorneys can in the somewhat formal setting of a voluntariness hearing. Thus the motion to dismiss G.W.'s appointed counsel was denied.

The parents further sought, again with the Commonwealth's support, to disqualify Mr. Ferleger specifically as appointed counsel for G.W., on the basis of (1) his alleged unfamilarity with G.W., (2) an alleged conflict arising from the asserted identity of Mr. Ferleger's arguments in Halderman with those advanced by the Pennsylvania Association for Retarded Citizens (a plaintiff in Halderman), and (3) the purported conflict caused by Mr. Ferleger's role as counsel of record for certain plaintiffs in Halderman v. Pennhurst.

The Hearing Master is satisfied with Mr. Ferleger's efforts to acquaint himself with the facts of G.W.'s case, and believes his performance in the hearing should have dispelled any doubts about the adequacy of his preparation. Further, I accept Mr. Ferleger's statement that he does not represent PARC or any of its affiliates; even if he did, the relevance to the instant case would be unclear. As for the purported conflict between Mr. Ferleger's anti-institutional stance on behalf of the plaintiff class in the main Halderman litigation and his representation of an individual class member in this proceeding, the Hearing Master fails to see any conflict whatsoever. On the surface, it seems entirely proper for an attorney for the plaintiff class in a lawsuit to represent a member of that class in a hearing which arises from and is part of that litigation. Moreover, regardless of what Mr. Ferleger's views may be in any other context, the Hearing Master's instructions were that he advocate for G.W.'s wishes insofar as they could be determined, and otherwise be guided by the presumption in this case in favor of placing mentally retarded

persons in the community, see Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979); Order of April 24, 1980, at 66 ; there has been no indication that these instructions have not been followed. While Mr. Ferleger felt it likely that some assumptions could be made about G.W.'s preference in this matter if G.W. were allowed to experience being in the community, this approach was foreclosed by the parents' decision not to allow pre-placement visits to the proposed community residence. Thus Mr. Ferleger had little choice but to advocate generally in favor of community placement.

The Commonwealth contended that designation of a guardian ad litem for G.W. would be more appropriate than Mr. Ferleger's appointment. But a guardian ad litem would be just another person seeking to determine G.W.'s "best interest" and to make the voluntariness decision for G.W. on that basis; what was needed in this hearing was not another substitute decision-maker, but rather an advocate who would press for G.W.'s separate legal entitlements. For these reasons, as well as those set forth in my order of September 22, 1980, the motion to disqualify Mr. Ferleger was denied.

A related motion was the request by the parents' attorney, Ms. Cohen, that she be compensated at the same rate ($60 per hour) as established in my order of September 22, 1980, for counsel appointed to represent Pennhurst resident G.W. This motion was denied. The Hearing Master appoints (and compensates) counsel for Pennhurst residents -- who are generally unable, financially and otherwise, to retain their own -- only in those situations where other parties can and do secure legal representation; it

would make no sense for the Hearing Master also to compensate the lawyers whose presence makes it necessary to appoint counsel in the first place. The Hearing Master will not discourage parents and governmental units from seeking legal representation, but I see no obligation to provide and pay for such assistance for anyone but the Pennhurst resident.

The parents also asked the Hearing Master to recuse himself on the basis of his alleged personal preference for community (as opposed to institutional) programs, which preference was assertedly demonstrated by his appointment of Mr. Ferleger to represent G.W. in this matter. I can only say that my personal philosophy is entirely consistent with the Third Circuit's decision in this case -- and that if my views were different, I could and would disregard them. The question in this hearing, in any event, is not "the community" versus "the institution," but the voluntariness and appropriateness of particular living arrangements and services for a particular individual. I perceive no difficulty in deciding these issues solely on the basis of the evidence and arguments presented to me; accordingly, the motion has been denied.

The parents next moved that the Hearing Master define the concept of "voluntariness" at the outset of the hearing, so that the parties would know what evidence to present and where the burden of proof would lie. While referring to previous decisions in which some aspects of "voluntary" transfers were discussed, the Hearing Master declined to decide the issues which might arise in the instant matter before hearing the evidence and the arguments of counsel, if any.

Referring to Exhibits GW-9, GW-10, and GW-11, Mr. Ferleger noted that there had been no mediation of the parents' evident objections to G.W.'s proposed community placement -- despite the requirement of the Order of April 24, 1980, at 64, that the Commonwealth attempt to mediate such disagreements -- and he moved that such mediation be provided. Ms. Cohen stated, and Ex. GW-11 confirms, that Pennhurst superintendent George Kopchick, the Commonwealth's designated mediator, has been unwilling to intervene in this and other cases where parents are opposed to "the whole concept of community placement." Indeed, as Dr. Rice, the Regional Commissioner of Mental Retardation, indicated, at the time this matter was pending there was no agreed upon mediation procedure in effect, even though one had been developed by the Commonwealth, with the involvement of the Special Master and the Hearing Master, several months ago. This being the case, Mr. Ferleger withdrew his motion.

After hearing the evidence in this case, the Hearing Master is extremely doubtful that any type of mediation would have eliminated R.W.'s and Mrs. C.Y.'s fundamental opposition to G.W.'s proposed community placement; nevertheless, if only for G.W.'s sake, it should have been attempted. The lack of prior mediation meant, in effect, that it went on in the context of the hearing, and that the County, Mr. Ferleger, the Special Master, and the Hearing Master were forced to discharge this responsibility of the Commonwealth toward G.W. and his parents. While Dr. Rice's candor and directness on certain points was much appreciated, the combination of the absence of mediation and the Commonwealth's

refusal to participate meaningfully in these hearings has the effect, at a minimum, of making them far more burdensome for the other parties that would otherwise be necessary.

3. Background

G.W. is a 19-year-old resident of Pennhurst who is classified as profoundly mentally retarded and who is totally blind, mildly self-abusive (he bites his hands, wrists, and arms), and very infrequently, if ever, assaultive toward other clients or staff. He is ambulatory (though somewhat fearful and hesitant because of his blindness), essentially non-verbal, and in need of assistance with some of his self-help skills although he is able to dress and undress by himself. G.W. is thought to have a seizure problem, but its nature and severity are unclear; he has also been excessively sleepy lately, which may be due to his medication regime. For these reasons, the County has proposed an in-depth neurological and psychiatric evaluation by a community specialist, but R.W. and Mrs. C.Y. have refused to allow G.W. to leave the Pennhurst grounds for this purpose. Although G.W. does not speak, he can respond to two-step commands and can communicate to some extent by means of gestures, growls, and facial expressions. In summary, despite his severe handicaps, G.W. has acquired many skills and possesses the potential to learn even more; as his Pennhurst casework supervisor testified, there is nothing about G.W. himself that would prevent his being placed in the community.

The County has now prepared an individual habilitation plan for G.W. (Cty. Ex. 3), and on the basis of that plan (developed with the involvement of his parents), it proposes to transfer him

from Pennhurst, where he has lived for seven years, to a community living arrangement near Paoli, Pennsylvania.

The proposed residence for G.W., to be operated by Community Homes, Inc., is a split-level home designed to accommodate three mentally retarded persons; since two of these persons (including G.W.) are blind, the residence has been extensively adapted by the addition of railings, non-visual "cues" such as abrasive material at the top and bottom of stairways, and rough-textured "trails" painted on the walls, which guide residents to bedrooms and bathrooms. Many of these modifications resulted from suggestions by a visually handicapped occupational therapist who works on G.W.'s unit at Pennhurst, the County's vision specialist, and the parents. G.W. and the others would have one-to-one staffing when present in the residence during the day,*/ and one staff worker would be on duty at night, with relief or backup on call within ten minutes.

In the County's opinion, before G.W. could move into the residence on a permanent basis, he would need extensive pre-placement visits with the involvement of Pennhurst staff with whom he is familiar (a Ms. Edna Plasko was mentioned frequently in this regard). Such visits have not been permitted by R.W. and Mrs. C.Y., since they requested termination of all pre-placement activity on June 1, 1980. (On June 10, 1980, they also prohibited further visits by County or community provider staff to G.W. at Pennhurst.)

If G.W. were placed in the community, there would be no change in his major day program, since he would continue to

*/ All current staff are trained in seizure control and are experienced with severely or profoundly retarded clients and those with behavior problems; two of the five have prior experience with the visually handicapped.

attend the Liberty Forge intermediate unit, the component of the Chester County public school program for handicapped children which is attended by most of Pennhurst's school-age residents.

The community residential and day program for G.W. resulted from an extensive planning and evaluation process (see Cty. Ex. 4, Ex. P-1, P-2, P-3) and is reflected in a transitional individual habilitation plan developed at a meeting on April 11, 1980, which was attended by G.W.'s parents, his certified advocate, prospective community providers, and G.W.'s County case manager Tim Greusel */ (Cty. Ex 3), and at an addendum meeting on June 8, 1980, between a Community Homes representative and Mr. Greusel which the parents did not attend. The plan has been approved by the Office of the Special Master as offering services which will be more beneficial to G.W.'s habilitation than those provided to him at Pennhurst, to the extent that such a determination can be made without more than one brief pre-placement visit by the client to the proposed residence. G.W.'s parents continue to object to the proposed placement.

4. Voluntariness of Transfer

Under the Court's Order of July 14, 1980, implementing the Order of the United States Supreme Court dated June 30, 1980, no resident of Pennhurst may be transferred to a community living arrangement unless and until the Hearing Master determines that the transfer in question is "voluntary."

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*/ Mr. Greusel, who testified at the hearing, was questioned by parents' counsel about the fact that after being G.W.'s County case manager from June, 1979 to September, 1980, he is now an employee of Community Homes, Inc., and is in charge of the

The above mentioned orders provide the Hearing Master with no guidance as to what constitutes a "voluntary" transfer; thus the term must be interpreted and applied on a case-by-case basis. The case of G.W. involves the application of this concept where the Pennhurst resident in question is 19 years old and is thus no longer a minor, has no legal guardian,*/ is unable to communicate his preference in the context of a hearing, and has not been afforded the opportunity to manifest his feelings in some other manner through exposure to the proposed community setting. Determining voluntariness in such a case is obviously not a simple exercise.

First, it should be clear that voluntariness is a consideration here solely because of the District Court's order interpreting the Supreme Court's partial stay. Under Pennsylvania law, see 50 P.S. §§4402, 4403, 4420 and implementing regulations, 3 Pa. Bull 1840 (1973), 6 Pa. Bull. 2884 (1976), Commonwealth officials

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(footnote continued)

residence proposed for G.W. It is clear, however, that the residence for G.W. was selected by the County long before Mr. Greusel was contacted regarding employment by Community Homes. And in fact, it might work to G.W.'s advantage to have his former case manager in charge of his community residence.

*/ Mrs. C.Y. said she and R.W. had not sought to become G.W.'s legal guardians because if the "experimental program" being proposed for G.W. were to fail, they would become responsible for his care, financially and otherwise. The Hearing Master does not believe that this concern is borne out by the record or by the applicable law. See 20 P.S. §§5501 et seq.

can generally discharge or refuse to admit persons whom they determine not to be in need of institutionalization, regardless of the wishes of the client or other applicant for admission. And it was clearly the case under the Order of April 24, 1980, at 63-67, that a mentally retarded person could be transferred from Pennhurst to a community living arrangement over anyone's objection, including his own, if it was determined that the CLA was more beneficial to that person's habilitation. Thus in determining voluntariness in cases such as that of G.W., the Hearing Master is essentially writing on a clean slate and not diminishing (or enhancing) a right that has an independent existence outside the immediate context.

Next, the Hearing Master has had occasion in prior cases to construe the Order of July 14, 1980, to this extent: at least in the case of adult Pennhurst residents, proposed transfers to community living arrangements should be presumed to be voluntary in the absence of any indication to the contrary. The Hearing Master hereby reaffirms that interpretation in this case. This presumption ought to be applied, in my opinion, because of the general legal principle favoring lesser over greater degrees of restriction on personal liberty, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975), and, more particularly, because of the legal presumption in all aspects of Halderman v. Pennhurst, which the Hearing Master must observe, in favor of placing mentally retarded persons in the community. Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979); Order of April 24, 1980, at 66. In light of the

foregoing general legal principle and its specific application to this case, when it is necessary to make some assumption regarding the resident's choice,the Hearing Master must presume, in the absence of any contrary indication on the record, that the resident would choose lesser rather than greater restriction and a program which is more likely to be beneficial to his habilitation rather than one which is less likely to be beneficial.

But in this case, of course, there are contrary indications in the record, emanating from G.W.'s parents; so the question becomes one of whether, how, and under what standard their objections should be evaluated. Especially since G.W. is an adult and since his parents are not his legal guardians, I do not believe that the objections of his parents, whatever their basis or their merits, must be treated as conclusive, so that the proposed transfer automatically becomes involuntary. As set forth more fully below, I do not think that total deference to the parents comports with what courts have done in similar situations or with the intention of the District Court in the instant matter.

It might be aruged that the Supreme Court's ruling in Secretary v. Institutionalized Juveniles, ___ U.S. ___, 99 S.Ct. 2523 (1979) -- which vests parents of retarded persons 18 and younger with substantial discretion over their children's admission to mental institutions -- requires the Hearing Master in this case simply to ascertain the parents' wishes and then comply with them. But I do not think Institutionalized Juveniles mandates such a result. To begin with, G.W. is neither a minor nor a person of the age covered by the Pennsylvania laws (50 P.S.

§§4402, 4403) which the Supreme Court upheld; he was not admitted to Pennhurst under those provisions but rather was committed by a court under 50 P.S. §4406 as then in effect. But even if Institutionalized Juveniles were to be applied by analogy to this proceeding, the result is not the same.

Although the word "voluntary" is used in both Institutionalized Juveniles and the Order of July 14, 1980, the question in this hearing is of a different character than that in proposed admissions or commitments; the voluntariness question here is what is the desired or preferred course of action, i.e., what does someone want -- rather than what is clinically necessary or appropriate, i.e., what should be done to or with somebody. And in any event, the statutory parental discretion approved in Institutionalized Juveniles was far from absolute; as the Supreme Court noted, the law satisfied due process requirements in part because facility directors retained the authority to deny admission (in the face of parental application and medical or physchological concurrence) if they determined that institutionalization was not required. Id. at 99 S.Ct. 2527-2528. Here, the professional determination has been made that G.W. does not need to remain at Pennhurst and, indeed, that he can probably benefit from community placement; thus, were it not for the Order of July 14, 1980, the holding in Institutionalized Juveniles would, if anything, point toward his release. */

*/ Mr. Ferleger argued forcefully at the hearing that G.W.'s initial commitment under 50 P.S. §4406 was illegal, and that he could not now be court committed under the prevailing standard. 6 Pa. Bull. 2884 (1976). While this may be so, it does not affect the determinations the Hearing Master is required to make in this case as to the voluntariness and, if necessary, appropriateness of the proposed community placement. See Ex. GW-1 to GW-6.

Despite the foregoing observations, I do not believe it would be proper for me to disregard entirely the objections of R.W. and Mrs. C.Y. Under the District Court's Orders of April 24, 1980, and July 14, 1980, parents of Pennhurst residents are clearly intended to participate in the planning and evaluation of proposed community placements, regardless of the age of the clients. Moreover, it is plain that concerned parents of Pennhurst resident of all ages were intended to have, and should have, a role in determining whether proposed community placements are voluntary. What that role should be in this case obviously depends on the standard for determining voluntariness.

After extensive research and consideration, the Hearing Master has determined that what he must do in this case is to make a substituted judgment as to what G.W. would choose if he were competent to do so -- to "decide what [he] would choose, if he were in a position to make a sound judgment." In re Weberlist, 360 N.Y.S. 2d 783 (Sup. Ct. N.Y. 1974). This approach has been utilized by the courts since 1816, when an English court disposed of an incompetent person's estate by substituting itself as nearly as possible for that person and basing its decision on the same factors and considerations that would have been relevant to the incompetent. Ex parte Whitbread, 35 Eng. Rep. 878 (1816). It has also been used by some courts to authorize the donation of kidneys by minors or legally incompetent adults to family members suffering from renal disease. Strunk v. Strunk, 445 S.W. 2d 145 (Ky. Ct. App. 1969); Howard v. Fulton-DeKalb Hospital Authority, 42 U.S.L.W. 2322 (Ga. Sup. Ct., November 29, 1973);

but see In re Richardson, 284 So. 2d 185 (La. App. 1973), cert. den. 284 So. 2d 338 (La. 1973); In re Pescinski, 226 N.W. 2d 180 (Wis. 1975).

I believe this approach is preferable to allowing G.W.'s parents an absolute veto, or to imposing my own beliefs upon G.W., because it gives meaning to the concept of voluntariness while still according to G.W. (and others) "the fullest possible expression to [their] character and circumstances." Superintendent of Belchertown v. Saikewicz, 370 N.E. 2d 417, ___ (Mass. 1977). As the court said in Saikewicz about a legally incompetent retarded person being offered life-saving medical treatment, it is not enough to determine the "best interests" of a voiceless individual or to make decisions for that individual on the basis of what a so-called "reasonable man" might do:

> The "best interests of an incompetent person are not necessarily served by imposing on such persons results not mandated as to competent persons. It does not advance the interest of the State or the ward to treat the ward as a person of lesser status or dignity than others . . . . [T]he State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons. . . . To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.

Id. at 428.

In attempting to determine whether G.W. would choose to remain at Pennhurst or move into the community, it is appropriate

to give weight to his parents' objections even though they are not binding. Certainly, the parents of a Pennhurst resident may be well situated to assist the Hearing Master in determining what decision their child would reach. But all parental objections are not entitled to the same weight; I will determine what weight to give them on the basis of (1) the degree of the parents' involvement with the Pennhurst resident, and their familarity with his present and proposed living arrangement and services; (2) the presence in the hearing record of at least some evidence substantiating the parents' concerns; and (3) the extent to which the parents' objections are based upon factors or issues which the resident himself would consider if he were able. Of course, I will also consider any actual manifestation of the Pennhurst resident's reactions or desires, as well as other relevant information from whatever source, in making my substituted judgment on the resident's behalf.

In this case, since there was only one brief pre-placement visit, there is no direct information as to G.W.'s reaction to the proposed community residence. Thus the Hearing Master must look primarily to the concerns expressed by the parents, and evaluate them under the above standard to determine what light they shed on how G.W. would make the decision himself.

First, the parents' recent involvement with G.W. has been moderate but not extensive. While no one can minimize the difficulties they endured when G.W. was living at home, or the efforts they made to find appropriate services for him (e.g., relocating the entire family in order to be near a special

school), R.W. and Mrs. C.Y. have visited G.W., at most, an average of twice a month during his stay at Pennhurst and have taken him home to visit on only one occasion. They have attended meetings regarding his individual education plan and annual program review (Ex. P-4, P-4B) while he has been at Pennhurst, and participated in the planning of his proposed community placement from August, 1979, until May, 1980 -- but for some reason, in the spring of 1980 they suddenly refused to cooperate any further. In fact, most of the information the parents presented at the hearing about supposed deficits in G.W.'s community program was acquired, not in the course of planning for possible community placement, but rather within the past few weeks -- a time period which coincides with the issuance of the County's notice of proposed placement and the scheduling of the hearing in this case.

Mrs. C.Y. visited the proposed community residence in February, 1980, before anyone lived there, suggested some structural modifications (which apparently were made), and did not return, so far as the record indicates, until she drove by the home (but did not go inside) some two weeks before the hearing. R.W. did not visit the proposed residence until three weeks before the hearing, and then went back to interview the neighbors approximately one week after that. The parents cut off G.W.'s preplacement visits after one uneventful stay of 45 minutes, and thus were unable to evaluate his adjustment or reaction to the proposed community residence. In sum, while R.W. and Mrs. C.Y. may have some acquaintance with Pennhurst, they are relatively

unfamiliar with the details of G.W.'s proposed community placement, particularly its residential component.

Nonetheless, the parents' concerns about G.W.'s proposed placement cannot be dismissed out of hand, and the Hearing Master must attempt to evaluate them as best he can. It is impossible, however, to sort out the conflicting claims as to what objections were raised at what point in time. According to the County, the parents made it clear in their initial meeting with Mr. Greusel in August, 1979, that they did not want G.W. to live in the same school district where his siblings were enrolled -- a stricture the County observed. The County also agreed at some point not to involve G.W. in activities at the YMCA which the other children might use. But on April 21, 1980, Mrs. C.Y. indicated to the County that the location of the proposed residence was nevertheless unacceptable because it was too close to her and R.W.'s homes (they are divorced). Still, planning for G.W.'s placement continued, and in May, 1980, a transitional individual habilitation plan was submitted to the parents for approval. On May 28 and June 1, 1980, R.W. and Mrs. C.Y. sent written objections to the County (Cty. Ex. 1,2); both of them mentioned, more prominently than any other concern, their disapproval of the location of G.W.'s proposed community residence -- e.g., "Location of CLA —— [G.W.] not to be involved in community activities in Malvern-Paoli and East on Lancaster Pike" (Cty. Ex. 2).

The County's understanding at the time of the hearing was that all other specific concerns mentioned by the parents in Cty. Ex. 1 and 2 had been addressed -- G.W.'s program had been

more clearly spelled out in his habilitation plan; the parents had been given a list of physicians from which to choose one for G.W. (they had not responded); the specification of a dental program awaited selection of a dentist from names similarly provided to the parents and/or an evaluation conducted off the grounds of Pennhurst, which the parents would not permit; and 24-hour supervision of G.W. in case of hospitalization had been assured (Cty. Ex. 1). The County did not see fit, as requested by Mrs. C.Y., to change its practice of renting residential property on a year-to-year basis rather than purchasing it outright, because it felt that flexibility was more important than stability in meeting clients' needs; and it was unwilling to agree that G.W. not be involved in any activities in the area specified by his mother, feeling that to do so would unduly restrict both G.W. and those trying to serve him. */ Finally, the County was unable to meet Mrs. C.Y.'s demand for a lifetime guarantee of funding for G.W.'s community program (Cty. Ex. 2).

In the Hearing Master's opinion, the County was as responsive as it reasonably could have been when the parents voiced these concerns; the one overarching objection which could not be satisfied was their opposition to the location of G.W.'s proposed community residence. Nonetheless, at the hearing, R.W. and Mrs. C.Y. continued to raise all these issues -- and some new ones as well. The most substantial are dealt with below.

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*/ For example, the County could not agree that G.W. would not use the services of the hospital closest to his residence.

One area of objection related to the asserted uncertainty of year-to-year funding for G.W.'s community program. While the Commonwealth's attorney, Mr. Slipakoff, stated during one colloquy that the State would not guarantee continued community funding for anyone, the sworn testimony of Dr. Rice -- who is responsible for all mental retardation programs in the Southeastern Region -- was of a decidedly different tenor. According to Dr. Rice, since the Pennsylvania legislature only appropriates funds for a year at a time, no program, in the institutions or in the community, is technically assured for more than one year. But, he said, it is highly unlikely and very unusual for a program already budgeted and in existence (such as G.W.'s) to be denied funding in a subsequent year.

William McKendry, the Chester County MH/MR Administrator, spoke at some length about the Commonwealth's supposedly inadequate funding of community programs, and said he would be the last one to assure that a community program would continue in the same way from year to year; but he also testified that the County had enough money in its budget to operate G.W.'s residential program for this fiscal year, and that if G.W.'s placement were approved, the necessary ancillary services would also be provided, even if doing so might mean denying a service to some other potential client. Despite his unhappiness with the Commonwealth's funding allocations (which might better have been expressed in another forum), in the end Mr. McKendry stood firmly behind his County's proposal for G.W., saying the County would do what it promised and that if G.W. were placed in the

community, the County wanted the placement to work. No CLA in Chester County, he said, has ever been closed because of lack of funds. When Dr. Rice's and Mr. McKendry's statements are taken together on this point, there is no basis in this record, or in law, for assuming that continued funding for G.W. in the community is any less assured than it is at Pennhurst.

Moreover, according to Mr. McKendry, there is no reason for the parents to fear that if G.W.'s proposed placement fails for lack of funds (or any other reason), they will be forced to take over his care. The County might seek to return a displaced client to his parents if no other CLA were available or appropriate, said Mr. McKendry, but it would not insist on the client's return if the parents were unable to care for him. The worst-case alternative in such a situation, said Mr. McKendry, would be placement in a State institution -- that is, the worst thing that could happen to G.W. is that he would go back to where he is now. The Hearing Master finds no justified cause for concern, therefore, in this entire line of objection.

There is a similar lack of support in the record of the parents' concerns about medical and dental care in the community. It is true that Mrs. C.Y. sent unenthusiastic communications (Ex. GW-15) */ to the physicians and hospitals which might serve G.W. in the community, and received some unenthusiastic communications in return (Ex. GW-16). But as Mrs. C.Y. herself conceded,

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*/ No one else has characterized G.W. as "hyper-active" (Ex. GW-15).

no health care provider refused to serve G.W. if selected for that purpose or if the need arose. According to the County, the doctors on the list provided to G.W.'s parents are currently providing services to Pennhurst class members or other retarded persons in the community, and despite local dentists' unhappiness with the reimbursement rate under medical assistance (Medicaid), no community client in the County is going without proper dental care. While the parents were quite critical of the proposed medical services in the community, they were apparently unaware of, or at least not concerned by, a recent incident at Pennhurst in which a nurse could not find G.W.'s vital signs after a cyst was removed from his scalp under sedation (Ex. GW-14). And their assertions that community hospitals could not care for G.W. seemed to be contradicted by the fact that he has been treated in such hospitals several times without incident. */

The parents also emphasized a wide array of inappropriate behaviors which they attributed to G.W. -- self abuse, a lack of interaction with others and with his environment, toileting "accidents," destruction of furniture and clothing, regurgiatation of food, biting other people, resisting attempts to move or motivate, staying awake at night, rejecting the use of a prosthesis (glass eye), and removing his clothes. However, there was little

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*/ Questions were also raised about the fact that medication would be administered to G.W. in the community by a CLA staff member (not a doctor or a nurse) handing it to him and seeing that he swallows it. Dr. Rice testified that this procedure would not violate any law or rule of the Commonwealth; and there was no evidence that G.W. would be thereby endangered.

or no current evidence of many of these behaviors (such as taking his clothes off and destroying things); no attempt had been made to get G.W. to use a prosthesis for several years; and there was ample indication that G.W. responds to people he knows (like Ms. Plasko at Pennhurst or B.G., a former Pennhurst resident now living in G.W.'s proposed CLA) and can communicate some of his feelings and needs. To the extent that they existed, none of these behaviors seemed particularly serious, and in any event, no one explained why they would constitute a reason for not placing G.W. in the community. To the contrary, Mr. Greusel testified that another client's far more frequent incidence of self abuse had been dramatically reduced in G.W.'s proposed community residence; he also suggested that if G.W. were involved in interesting activities (instead of taking naps) during the day, he would be more likely to sleep through the night. Thus the parents' description of G.W.'s difficult behaviors, magnified or not, does not militate against his community placement.

Although a number of other concerns were alluded to in the hearing, */ only one more is worthy of specific discussion here: the parents' concern about community opposition and about G.W.'s possible reaction to what his father called a "hostile world."

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*/ For example, Mrs. C.Y. felt that more attention would be focused on improper conditions at Pennhurst than would be brought to bear upon such conditions in community programs; but Mr. McKendry described an ambitious system of monitoring for County programs which included two visits per month by case management staff and extensive review of all reported incidents. And while the County has no specific emergency or respite care plans for G.W., such facilities are now or can be made available, depending upon the nature of the problem that arises.

In the first place, the parents' speculation about G.W.'s reaction to any aspect of community placement is only that -- speculation -- since G.W. was not given an opportunity to experience life in his proposed residence for any length of time. Moreover, although Mrs. C.Y. spoke to a local zoning official who reacted negatively to community residences for mentally retarded persons,and although R.W. interviewed neighbors who had heard unusual noises coming from G.W.'s proposed CLA or who were for some time unaware of the nature of the residence, there was no substantial evidence of any actual opposition to the CLA in the neighborhood where it is situated. (A rock was thrown through a window of the residence in June, 1980, but on one knows why this was done and there have been no similar occurrences.) The record therefore does not support community opposition as an objection to this particular placement.

What remains, then, as the sole parental objection supported by any degree of evidence in the record is the concern of R.W. and Mrs. C.Y. that they or their other children might be "embarrassed" if they encountered G.W. in the community, particularly if he were engaging at the time in some inappropriate or disruptive behavior. The parents genuinely feel that their other children would suffer if they had to be confronted with such a situation where they go to school or where they socialize with their friends. Behind this feeling, as Mrs. C.Y. stated, is a sense of guilt that the family could not do more for G.W. and that the decision had to be made to place him in Pennhurst; the Hearing Master can readily believe and understand that the family does not want to

re-examine that decision, as they would be forced to do if G.W. once again became, in some degree, a part of their community. This is the real sentiment behind the parents' concern about G.W.'s proposed school district, the location of his community residence, the YMCA where he would go for recreation, the hospital where he would be treated, and even the barber who cuts his hair -- the barber should not be in downtown Paoli, said Mrs. C.Y., "because that's where we live."

This concern is not a mean or selfish one; rather, it is an honest and heartfelt reaction to a difficult and painful situation. I do not condemn the parents for their feelings -- but I cannot uphold them as a basis for keeping G.W. at Pennhurst. While some (but not all) of the other objections to placement voiced by the parents might involve factors that G.W. himself would consider in deciding whether to stay or go, they are not supported by the record; and while the parents' feelings of embarrassment are subtantiated by the evidence (that is, they do exist), I must conclude that they are relevant only to others and not to the person for whom I must make a substituted judgment. I do not believe that G.W., in deciding for himself whether to accept the proposed transfer from Pennhurst to a CLA, would give negative weight to his parents' (and siblings') reluctance to confront him in the community; if anything, I believe he would react positively to the chance to live once again in their society, in a better situation than before. And I believe he would absolve them of their guilt, if they would only absolve themselves.

No relevant contrary indication being supported by the record, I must therefore conclude that the proposed community placement of G.W. is voluntary.

5. Relative Habilitative Benefit

Separate from the question of voluntariness is the inquiry as to whether the living arrangements and services which are being offered to G.W. in the community are more beneficial to his habilitation than those being provided at Pennhurst. A community program may be more beneficial without necessarily being one that a Pennhurst resident would choose, and the converse is also true. Thus the issue of appropriateness must also be addressed.

Since G.W.'s school program will not change, there is no issue as to its continuing benefit. As to the residential aspects of the current and proposed programs, it appears from the evidence that G.W. will have more intensive staff involvement in the community than at Pennhurst (one-to-one as opposed to one or two-seven) as well as a wider range of programs and activities (besides school, his only current Pennhurst program is recreation), and more pleasant and quieter surroundings (he dislikes the sudden, loud noises that are frequently heard at Pennhurst). While certain aspects of G.W.'s community habilitation plan (Cty. Ex. 3) could not be completed because pre-placement activities were halted, even as it stands the County's plan is far more comprehensive and thoughtful than the corresponding document at Pennhurst (Ex. P-4, P-4B). The diligent and sensitive planning by the County, together with the residence provider's apparent success with clients who have similar handicaps, augurs well

for G.W.'s accelerated personal development in the proposed community setting. Therefore, treating the parents' objections (described above) as concerns about the relative habilitative benefits of G.W.'s proposed and current programs, I find that the greater benefit is much more likely to occur in the proposed community placement.

G.W. should not be transferred, however, without the pre-placement visits which many witnesses testified were necessary for a successful transition; my order will provide for such visits before this transfer is finally approved. My order will also allow for the possibility that G.W. may, during these visits, evince reactions to the experience that are contrary to the judgment I have made for him on the basis of current information. The evidence I have heard, though, convinces me rather strongly that G.W. will enjoy this new opportunity -- and that in time his family will also come to accept it.

6. Decision and Order

1. The Hearing Master finds and concludes that the proposed transfer of Pennhurst resident G.W. from Pennhurst to a community living arrangement in Chester County is voluntary in all respects.

2. The Hearing Master finds and concludes that the living arrangements and services which have been made ready for G.W. in the community are more beneficial to his habilitation than those being provided to him at Pennhurst.

3. It is hereby ORDERED that the County MH/MR Administator of Chester County is authorized and directed to proceed with the proposed community placement of Pennhurst resident G.W. as set

forth in the County's notice of placement dated September 9, 1980. The County is further ORDERED to effect such transfer on a gradual basis over a period of not more than 90 days from the date of this order, with final placement to be preceded by pre-placement visits of such number and duration as the County deems necessary and appropriate.

4. This case shall remain open for a period of 90 days from the date of this order, during which time any party to this hearing may notify the Hearing Master, in writing, of any matter or occurrence arising within the specified time period which indicates that the placement of G.W. as herein approved is not voluntary, or that it does not offer greater habilitative benefit to G.W. than his present program at Pennhurst. Such notification shall be served upon all other parties to this proceeding, and shall be made in sufficient detail to enable the Hearing Master to determine whether a further hearing is necessary. No notification, or part of same, will be considered which relates to any matter or occurrence outside the 90-day period specified herein.

5. This decision and order is final as to all matters or occurrences which were raised or could have been raised in the hearing heretofore held in this case. If no notification as described in paragraph 4 above is received within 90 days from the date of this order, this case will be considered closed without the necessity of further action by any party or by the Hearing Master.

7. Procedures for Appeal

Exceptions to the Hearing Master's report may be taken by any participant in the hearing (i.e., the Pennhurst resident, the resident's parent/guardian and/or certified advocate, the Special Master, the Commonwealth, or the appropriate County). Exceptions must be filed, in writing, not later than ten days after the Hearing Master's report is filed with the Clerk of the Court (regardless of the date copies are received) by mailing or delivering such exceptions to:

Clerk of the Court
United States District Court
Room 2609
United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106.

If the tenth day after filing of the Hearing Master's report is a Saturday, Sunday, or Pennsylvania or Federal legal holiday, then the next day which is not a Saturday, Sunday, or legal holiday is the last day on which exceptions may be filed with the Court. For further instructions, see the procedures attached to the Notice of Hearing, at p. 8-10.

DONE this 15th day of October, 1980.

HEARING MASTER

HEARING MASTER
Halderman v. Pennhurst
UNITED STATES DISTRICT COURT

Re: Proposed Community Placement Of P.T.

No. 80-P-4
(Civ. Act. No. 74-1345)

REPORT OF THE HEARING MASTER

1. Procedural History

On or about August 12, 1980, the Hearing Master received from the MH/MR Administrator of Delaware County a notice of a proposed community placement of P.T., a resident of Pennhurst, dated August 6, 1980. Pursuant to the Order of July 14, 1980, the Hearing Master, on August 14, 1980, notified P.T., his parents, Delaware County, the Commonwealth, and the Special Master of a hearing to be held in the Hearing Master's office on September 8, 1980, to determine the voluntariness of the proposed transfer of P.T. from Pennhurst to a community living arrangement in Delaware County. At the request of the parents and because of P.T.'s temporary illness, the hearing was rescheduled for September 16, 1980, and was held on that date and on October 1, 1980.

The hearing was attended by P.T. (first day only) and Penelope Boyd, Esq., the attorney appointed for him by the Hearing Master's order of August 29, 1980; by Mr. and Mrs. F.T. and their attorney, Pamela P. Cohen, Esq.; by the County and its attorney, Patricia Jenkins, Esq.; and by the Office of the Special Master. In addition, although the Commonwealth has declined to participate voluntarily as a party to these proceedings, the Regional Commissioner of Mental Retardation, Dr. Russell Rice,

appeared pursuant to subpoena on September 16, 1980, along with his attorney, Robert Hoffman, Esq. */ Dr. Rice was excused from attending the second day of the hearing.

2. Preliminary Matters

A number of motions were made and ruled upon at the outset of the hearing, and their disposition will be included here as part of the Hearing Master's report. First, the parents moved (with the County's concurrence) to terminate the hearing as being in violation of the partial stay granted on June 30, 1980, by the Unied States Supreme Court in Halderman v. Pennhurst State School and Hospital. This motion was denied on the ground that the Hearing Master, even if he were so inclined, lacks the authority to overrule the District Court's Order of July 14, 1980, which requires hearings to determine the voluntariness of each proposed transfer of a Pennhurst resident to a community living arrangement.

The parents then moved, with the support of the Commonwealth, to dismiss Ms. Boyd as the attorney for P.T. in this matter, on the basis that the Hearing Master has no authority to appoint

*/ Dr. Rice's presence was required by the Hearing Master's standing order of September 15, 1980, as well as by a subpoena served on behalf of Pennhurst resident P.T. The issue which occasioned the Hearing Master's standing order was apparently resolved during the pendency of this matter, although final resolution awaits written confirmation of the Commonwealth's position.

counsel for Pennhurst residents in these proceedings. Whatever may be the import of the reference to retention or provision of attorneys in the Order of April 24, 1980, at 65, and whatever may be the obligation of the Commonwealth thereunder, the Hearing Master believes he has the authority to appoint counsel under Rule 53(c), F.R. Civ. P., which states in relevant part that

> . . . the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order [of reference].

In the instant case, where three other parties to the hearing are represented by counsel, the Hearing Master believes appointment of counsel for the Pennhurst resident is necessary to ensure a balanced presentation of the issues and a proper recognition of the resident's separate legal interest. Thus the motion to dismiss P.T.'s appointed counsel was denied.

By far the most vigorously contested motion made at the hearing was that of the parents seeking to disqualify Ms. Boyd specifically as appointed counsel for P.T., on the basis of (1) Ms. Boyd's alleged unfamilarity with P.T., (2) the purported conflict caused by Ms. Boyd's role as counsel of record for the plaintiffs in Halderman v. Pennhurst, and (3) an alleged conflict arising from Ms. Boyd's asserted relationship with the Pennsylvania Association for Retarded Citizens (one of the plaintiffs in Halderman) and the presence of DelARC, a PARC affiliate, as the proposed community residence provider for P.T. The question of Ms. Boyd's fitness to represent P.T. with respect to the voluntariness and appropriateness of his proposed community

placement, particularly in view of plaintiffs' position in the trial of Halderman to the effect that Pennhurst should be closed, was raised not only at the outset of the hearing but again on the second day (see Ex. P-1, P-2).

The Hearing Master is satisfied with Ms. Boyd's efforts to acquaint herself with the facts of P.T.'s case, and accepts her statement that she has no connection with, and does not represent, PARC or any of its affiliates; thus the first and last objections to her appointment are without merit. As for the conflict between her anti-institutional stance on behalf of the plaintiff class in the main Halderman litigation and her representation of an individual class member in this proceeding, the Hearing Master fails to see any conflict whatsoever. On the surface, it seems entirely proper for an attorney for the plaintiff class in a lawsuit to represent a member of that class in a hearing which arises from and is a part of that litigation. Moreover, to the extent that Ms. Boyd's personal views or legal arguments may have deviated in the past or may deviate in the future from the prevailing law of this case, Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979), she has agreed on the record that she is presently bound by the Third Circuit's decision. The Hearing Master's instructions to Ms. Boyd were to advocate for P.T.'s wishes insofar as they can be determined, and otherwise to be guided by the presumption in this case in favor of placing mentally retarded persons in the community (see Halderman v. Pennhurst, supra; Order of April 24, 1980, at 66); there has been no indication that these instructions have not been

followed. For these reasons, as well as those set forth in my order of August 29, 1980, the motion to disqualify Ms. Boyd was denied.

A related motion was Ms. Cohen's request that she be compensated at the same rate ($60 per hour) as established in my order of August 29, 1980, for counsel appointed to represent Pennhurst resident P.T. This motion was denied because the Hearing Master appoints (and compensates) counsel for Pennhurst residents -- who are generally unable, financially and otherwise, to retain their own -- only in those situations where other parties can and do secure legal representation; it would make no sense for the Hearing Master also to compensate the lawyers whose presence makes it necessary to appoint counsel in the first place. The Hearing Master will not discourage parents and governmental units from seeking legal representation, but I see no obligation to provide and pay for such assistance for anyone but the Pennhurst resident.

The parents also asked the Hearing Master to recuse himself on the basis of certain pro-community statements he allegedly made at a meeting at Bryn Mawr College in June, 1980. (Mr. Hoffman took no formal position on this motion on behalf of the Commonwealth, but professed surprise at the Hearing Master's alledged remarks.) I cannot now recall what I said at the Byrn Mawr conference, and can only say that my personal philosophy is entirely consistent with the Third Circuit's decision in this case -- and that if it were not, I could and would disregard it. The question in this hearing, in any event,

is not "the community" versus "the institution," but the voluntariness and appropriateness of particular living arrangements and services for a particular individual. I perceive no difficulty in deciding these issues solely on the basis of the evidence and arguments presented to me; accordingly, the motion has been denied.

The parents next moved that the Hearing Master define the concept of "voluntariness" at the outset of the hearing, so that the parties would know what evidence to present and where the burden of proof would lie. While referring to previous decisions in which some aspects of "voluntary" transfers were discussed, the Hearing Master declined to decide the issues which might arise in the instant matter before hearing the evidence and the arguments of counsel, if any.

Finally, Ms. Boyd moved on P.T.'s behalf to limit the hearing in this matter to the question of whether P.T. should be exposed to the pre-placement visits to the proposed community residence which normally precede the actual transfer to the community -- and indeed, which normally precede the hearings on voluntariness and appropriateness. In the ensuing discussion, it developed that P.T. had not been on any visits to the proposed residence, that his parents were not now willing to agree to such visits, and that they had certain concerns (physical safety, child abuse, and inadequate planning) that would have to be addressed before such visits could be considered. Mr. Hoffman then moved that the parties be required to mediate their disagreements with the Commonwealth's assistance, pursuant to

the Order of April 24, 1980, at 64. No such mediation had been attempted, but since the parents initially declined to submit to this process, the Commonwealth's motion was denied (see infra). As to Ms. Boyd's motion, the Hearing Master was of the opinion that hearings were to be held on the voluntariness and appropriateness of proposed community placements, rather than on parents' objections to pre-placement visits; therefore, the motion to confine the hearing to the latter issue was denied.

As the hearing went on, however, it became increasingly clear that the lack of pre-placement visits was operating to deprive the parties and the Hearing Master of possibly valuable information as to the suitability of P.T.'s proposed community program and P.T.'s reaction and adjustment to the residence in question. While there was a serious dispute, which the Hearing Master will not attempt to resolve, as to when, how, and whether mediation was offered to and/or rejected by Mr. and Mrs. F.T. -- and the relation of these events or non-events to the possibility of pre-placement visits -- two points became quite clear to the Hearing Master: first, the Commonwealth had not intervened directly with an offer of mediation but rather had caused the offer to be communicated to the parents by the County in a cryptic and ineffective manner (Cty. Ex. 2), and second, despite the parents' prior letter to the County expressing opposition to any community placement (Cty. Ex. 3), they were voicing specific concerns at the hearing which seemed eminently susceptible to mediation. At the end of the first day of hearing, after repeated urgings by the Hearing Master and Mr. Hoffman, Mr. and Mrs. F.T. agreed to attempt to resolve their concerns through

the Commonwealth's mediation process, and the hearing was recessed for that purpose.

The only problem with this rather positive development was that there was no mediation process in existence. Despite the plain requirement of the Order of April 24, 1980, at 64, that the Deputy Secretary for Mental Retardation or her designee attempt to resolve disagreements over proposed community placements, and despite the Hearing Master's (and Mr. Hoffman's) understanding that a mechanism for same was available, Ms. Cohen reported to the Hearing Master on or about September 25, 1980, and the Hearing Master subsequently confirmed, that no official of the Commonwealth was prepared to mediate the problems in this case. Upon resumption of the hearing, Ms. Cohen stated, without contradiction, that Mr. and Mrs. F.T. had not been contacted by any Commonwealth representative. Moreover, said Ms. Cohen, when she contacted Pennhurst superintendent Geroge Kopchick, the Commonwealth's designated mediator (Cty. Ex. 2), he told her that while he might attempt to resolve a minor disagreement, he would not intervene in a situation, such as the instant matter, where the parents were raising substantial objections. And so the hearing continued to its inevitably unpleasant conclusion.

The Hearing Master is at a loss to understand the Commonwealth's indifference toward parents like Mr. and Mrs. F.T. who are honestly troubled by questions regarding the community programs being proposed for their children -- and toward the residents of Pennhurst whose lives and futures depend on the resolution of those questions. I am convinced that the absence

of the mandated mediation procedures in this case necessitated, as much as any other factor, the unfortunate and unsatisfactory decision I have been compelled to render.

3. Background

P.T. is an 18-year-old resident of Pennhurst who is severely or profoundly mentally retarded, with significant physical deficits (poor balance, weak muscular functioning, and fairly frequent seizures) but with no severe behavior problems. He is ambulatory (though he often loses his balance), essentially nonverbal, and is need of assistance with most of his self-help skills such as eating, toileting, and dressing. Very small for his age, P.T. is an appealing young man who seems interested in his environment and quite affectionate towards people he knows. He likes to walk and explore things, but has no sense of danger and has a habit of putting foreign objects in his mouth. All in all, though he is severely handicapped and requires close supervision, there is nothing about P.T. that makes him an especially difficult or inappropriate candidate for community placement. In particular, a neurological evaluation by the County's core team specialist established that P.T. had no neurological problem (e.g., seizures) which would be exacerbated by movement into the community.

The County has now prepared an individual habilitation plan for P.T. (Cty. Ex. 1), and on the basis of that plan (developed with the involvement of his parents), it proposes to transfer him from Pennhurst, where he has lived for 4 1/2 years, to a community living arrangement in Lansdowne, Pennsylvania.

The proposed residence for P.T., to be operated by DelARC, is designed to accommodate five (possibly six) mentally retarded persons; P.T. would be on the first floor with two other clients, accompanied by two staff workers during waking hours. The night-time staffing initially assigned to the residence (one person awake on the premises from 11 p.m. to 7 a.m. to care for all five or six clients) was concededly inadequate, but steps have been taken to add another person to this shift. A nurse would be available to administer P.T.'s seizure and other medication in the residence.

P.T. has been evaluated and determined to be in need of speech therapy, physical therapy, and occupational therapy, and would receive these services in the community under the auspices of the County core team. Within one month of placement, he would receive further behavioral, orthopedic, hearing, dental, and dietary evaluations, and any services determined to be necessary would be incorporated into a revised habilitation plan within 60 days of placement.

During the day, P.T. would attend the Summit School, a component of the Delaware County public school unit for handicapped children, which is essentially similar to P.T.'s current education program (at the Liberty Forge unit in Chester County) in terms of distance from his residence, staffing, and program. The Summit School would follow P.T.'s individual education plan from Liberty Forge for 30 days, after which it would develop a new IEP with the involvement of parents and others. A major focus of P.T.'s community program, in school and in the residence,

would be the development of daily living skills, particularly toilet training.

The community residential and day program for P.T. resulted from an extensive planning process and is reflected in a transitional individual habilitation plan finally developed at a meeting on June 5, 1980, which was attended by P.T.'s parents, prospective community providers, P.T.'s County case manager, and others (Cty. Ex. 1). The plan has been approved by the Office of the Special Master as offering services which will be more beneficial to P.T.'s habilitation than those provided to him at Pennhurst, to the extent that such benefits can be determined without pre-placement visits by the client to the proposed residence. P.T.'s parents continue to object to the proposed placement.

4. Voluntariness of Transfer

Under the Court's Order of July 14, 1980, implementing the Order of the United States Supreme Court dated June 30, 1980, no resident of Pennhurst may be transferred to a community living arrangement unless and untill the Hearing Master determines that the transfer in question is "voluntary."

The above mentioned orders provide the Hearing Master with no guidance as to what constitutes a "voluntary" transfer; thus the term must be interpreted and applied on a case-by-case basis. The case of P.T. involves the application of this concept where the Pennhurst resident in question has had his eighteenth birth-

day and is thus no longer a minor,*/ has no legal guardian, is unable to communicate his preference in the context of a hearing, and has not been afforded the opportunity to manifest his feelings in some other manner through exposure to the proposed community setting. Determining voluntariness in such a case is obviously not a simple exercise.

First, it should be clear that voluntariness is a consideration here solely because of the District Court's order interpreting the Supreme Court's partial stay. Under Pennsylvania law, see 50 P.S. §§4402, 4403, 4420 and implementing regulations, 3 Pa. Bull. 1840 (1973), 6 Pa. Bull. 2884 (1976), Commonwealth officials can generally discharge or refuse to admit persons whom they determine not to be in need of institutionalization, regardless of the wishes of the client or other applicant for admission. And it was clearly the case under the Order of April 24, 1980, at 63-67, that a mentally retarded person could be transferred from Pennhurst to a community living arrangement over anyone's objection, including his own, if it was determined that the CLA was more beneficial to that person's habilitation. Thus in determining voluntariness in cases such as that

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*/ It is true that Pennsylvania's "voluntary" admission/commitment statute, 50 P.S. §§4402, 4403, upheld by the United States Supreme Court in Secretary v. Institutionalized Juveniles, ___ U.S. ___, 99 S.Ct. 2523 (1979), allows parents to initiate institutionalization of children "18 years of age or younger," but this statutory aberration does not change the generally accepted age of majority. Even if P.T. were considered a "mature minor" rather than an adult, the analysis in this report would be the same.

of P.T., the Hearing Master is essentially writing on a clean slate and not diminishing (or enhancing) a right that has an independent existence outside the immediate context.

Next, the Hearing Master has had occasion in prior cases to construe the Order of July 14, 1980, to this extent: at least in the cases of adult Pennhurst residents, proposed transfers to community living arrangements should be presumed to be voluntary in the absence of any indication to the contrary. The Hearing Master hereby reaffirms that interpretation in this case, the first in which the voluntariness question has been genuinely contested. This preumption ought to be applied, in my opinion, because of the general legal principle favoring lesser over greater degrees of restriction on personal liberty, e.g., Shelton v. Tucker, 346 U.S. 479, 488 (1960); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975), and, more particularly, because of the legal presumption in all aspects of Halderman v. Pennhurst, which the Hearing Master must observe, in favor of placing mentally retarded persons in the community. Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979); Order of April 24, 1980, at 66. In light of the foregoing general legal principle and its specific application to this case, when it is necessary to make some assumption regarding the resident's choice, the Hearing Master must presume, in the absenceof any contrary indication on the record, that the resident would choose lesser rather than greater restriction and a program which is more likely to be beneficial to his habilitation rather than one which is less likely to be beneficial.

But in this case,of course, there are some contrary indications in the record, emanating from P.T.'s parents; so the questions becomes one of whether, how, and under what standard the parents' objections should be evaluated. Especially since P.T. is an adult and since his parents are not his legal guardians, I do not believe that the objections of his parents, whatever their basis or their merits, must be treated as conclusive, making the proposed transfer involuntary. As set forth more fully below, I do not think that total deference to the parents comports with what courts have done in similar situations or with the intention of the District Court in the instant case.

It might be argued that the Supreme Court's ruling in Secretary v. Institutionalized Juveniles, supra -- which vests parents of retarded persons 18 and younger with substantial discretion over their children's admission to mental institutions -- requires the Hearing Master in this case simply to ascertain the parents' wishes and then comply with them. But in my opinion, even though the word "voluntary" is used in both instances, the question in this hearing is of a different character than that in proposed admissions or commitments; the voluntariness question here is what is the desired or preferred course of action, i.e., what does someone want -- rather than what is clinically necessary or appropriate, i.e., what should be done to or with somebody. And in any event, the statutory parental discretion approved in Institutionalized Juveniles was far from absolute; as the Supreme Court noted, the law satisfied due process requirements in part because facility directors retained the authority to deny ad-

mission (in the face of parental application and medical or psychological concurrence) if they determined that institutionalization was not required. Id. at 99 S.Ct. 2527-2528. Here, the professional determination has been made that P.T. does not need to remain at Pennhurst and, indeed, that he can benefit from community placement; thus, were it not for the Order of July 14, 1980, the holding in Institutionalized Juveniles would, if anything, require his release.

Nonetheless, I do not believe it would be proper for me to disregard entirely the objections of P.T.'s parents. Under the District Court's Orders of April 24, 1980, and July 14, 1980, parents of Pennhurst residents are clearly intended to participate in the planning and evaluation of proposed community placements, regardless of the age of the clients. In addition, I am convinced that concerned parents of Pennhurst residents of all ages were intended to have, and should have, a role in determining whether proposed community placements are voluntary. What that role should be in this case obviously depends on the standard for determining voluntariness.

After extensive research and consideration, the Hearing Master has determined that what he must do in this case is to make a substituted judgment as to what P.T. would choose if he were competent to do so -- to "decide what [he] would choose, if he were in a position to make a sound judgment." In re Weberlist, 360 N.Y.S. 2d 783 (Sup. Ct. N.Y. 1974). This approach has been utilized by the courts since 1816, when an English court disposed of an incompetent person's estate by substituting itself as nearly as possible for that person and basing its decision on

the same factors and considerations that would have been relevant to the incompetent. Ex parte Whitbread, 35 Eng. Rep. 878 (1816). It has also been used by some courts to authorize the donation of kidneys by minors or legally incompetent adults to family members suffering from renal disease. Strunk v. Strunk, 445 S.W. 2d 145 (Ky. Ct. App. 1969); Howard v. Fulton-DeKalb Hospital Authority, 42 U.S.L.W. 2322 (Ga. Sup. Ct., November 29, 1973); but see In re Richardson, 284 So. 2d 185 (La. App. 1973), cert. den. 284 So. 2d 338 (La. 1973); In re Pescinski, 226 N.W. 2d 180 (Wis. 1975).

I believe this approach is preferable to allowing P.T.'s parents an absolute veto, or to imposing my own beliefs upon P.T., because it gives meaning to the concept of voluntariness while still according to P.T. (and others) "the fullest possible expression to [their] character and circumstances." Superintendent of Belchertown v. Saikewicz, 370 N.E. 2d 417, ___ (Mass. 1977). As the court said in Saikewicz about a legally incompetent retarded person being offered life-saving medical treatment, it is not enough to determine the "best interests" of a voiceless individual or to make decisions for that individual on the basis of what a so-called "reasonable man" might do:

> The "best interests of an incompetent person are not necessarily served by imposing on such persons results not mandated as to competent persons. It does not advance the interest of the State or the ward to treat the ward as a person of lesser status or dignity than others . . . . [T]he State must recognize the dignity and worth of such a

> person and afford to that person the same panoply of rights and choices it recognizes in competent persons. . . . To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.

Id. at 428.

In attempting to determine whether P.T. would choose to remain at Pennhurst or move into the community, it is appropriate to give weight to his parents' objections even though they are not binding. Certainly, the parents of a Pennhurst resident may be well situated to assist the Hearing Master in determining what decision their child would reach. But all parental objections are not entitled to the same weight; I will determine what weight to give them on the basis of (1) the degree of the parents' involvement with the Pennhurst resident, and their familarity with his present and proposed living arrangement and services; (2) the presence in the hearing record of at least some evidence substantiating the parents' concerns; and (3) the extent to which the parents' objections are based upon factors or issues which the resident himself would consider if he were able. Of course, I will also consider any actual manifestation of the Pennhurst resident's reactions or desires, as well as other relevant information from whatever source, in making my substituted judgment on the resident's behalf.

In this case, since there were no pre-placement visits, there is no direct information as to P.T.'s reaction to community living. Thus the Hearing Master must rely primarily upon the

parents' testimony, and evaluate it under the above standard to determine what light it sheds on how P.T. would make the decision himself.

To begin with, there is no question that P.T.'s mother and father are closely involved with him and genuinely concerned about his welfare. They have visited him once or twice a month during his 4 1/2 years at Pennhurst, and have taken him home every holiday for up to five days at a time; moreover, their concern and affection for their son were obvious during the hearing. Mr. and Mrs. F.T. participated in the planning for P.T.'s community placement for approximately a year, attended several meetings in this regard, visited both the proposed residence and the Summit School, and discussed P.T.'s proposed program extensively with staff of the County and the provider agencies. They have also attended annual program reviews at Pennhurst. Thus the parents speak with considerable knowledge about the services being offered to P.T. in the community and those being provided at Pennhurst.

As noted above, Mr. and Mrs. F.T.'s objections focused on the areas of safety, child abuse, and inadequate community planning. Almost without exception, the concerns they raised were matters that P.T. would consider in making his own decision -- obviously, a person being moved to a new home and school setting would want to know if he were in danger of being physically injured, either by accident or by deliberate abuse. And while some of the parents' concerns were not substantiated by any credible evidence, most of what they said seemed to have at least some basis in fact.

Perhaps most significant in this regard, in terms of the record made at the hearing, were the County's uneuthusiastic presentation of its proposed program for P.T., the Commonwealth's disinclination to offer the parents any support or encouragement, and the grudging, incomplete, and unsatisfactory answers provided by the County and the prospective residential provider to the parents' legitimate questions. I cannot blame the parents for asking these questions, and for not being satisfied with the replies. Further, I cannot say that P.T., if he had asked the same questions and been given the same answers, would be any more comfortable than his parents are with the proposed community placement. I am not going to shove this proposed placement down the throats of not only P.T. and his parents, but of the County and the Commonwealth as well.

Some of the possible problems identified by the parents, for example, related to physical aspects of the proposed residence: a four-foot grade or drop from the sides of the house to the street, unenclosed cement steps leading to the cellar, an "L" shaped driveway obscuring the vision of persons driving up to the residence, lack of a fence to keep P.T. and others from straying on to a nearby highway, a bathtub the parents felt was unsafe for P.T., and no door between the kitchen and the rest of the residence. The parents were concerned about these features of the residence because of P.T.'s unsteady gait and his unawareness of dangerous situations.

The County, through Ms. Jenkins and Steven Chafetz, its Pennhurst liaison, indicated a willingness to have the residence fenced in, and agreed to install a door to the kitchen (which

had already been ordered in the case of S.P., No. 80-P-10). As for the other problems, the County said, in effect, that there is always a risk to clients like P.T., and that the danger would remain even if all the requested changes were made. Ms. Jenkins said the County would not object if the residence provider, DelARC, decided to make the adjustments on its own and with its own funds; otherwise, the County's role would be limited to transmitting the provider's request for funds to the Commonwealth for approval. Wayne Dudiak of DelARC, called to testify on behalf of P.T., was unable to commit his agency to any particular alterations. All in all, while some of the dangers cited by the parents may have been illusory (the bathtub, as described, did not seem terribly hazardous), */ the response of the County and the provider was anything but reassuring.

Similarly, although the Hearing Master was not much taken with Mr. and Mrs. F.T.'s complaints about the arrangements for P.T.'s medical care in the community, he could well believe that the parents (and P.T., if he understood) would be worried by Mr. Dudiak's "understanding" that seizure management had been "touched on" but not "expanded upon" in the training of residence staff. In the same vein, Mr. F.T. testified that he had seen a staff member of the Summit School physically abuse a child during his and Mrs. T.'s visit to the school; this observation may or may

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*/ The parents also complained bitterly that P.T.'s habilitation plan (Cty. Ex. 1) called for him to be taken swimming in disregard of his fear of the water, when in fact the plan indicated full and due regard for this problem.

not have been significant in terms of what would happen to P.T., but the parents' concerns were no doubt intensified, as P.T.'s would have been, by the County's response that it could not guarantee an investigation if a complaint of abuse were made against the school. This was, at best, a bureaucratic rather than humane response.

Finally, in response to a question by the parents' attorney regarding the relative benefit of the community as compared to Pennhurst, Mr. Chafetz replied that he could not answer because he did not know of "any place in the country where children of this functioning level have been placed in this kind of setting." The Hearing Master does not believe this statement is factually accurate, even as it applies to the State of Pennsylvania, but in any event it could only have confirmed Mr. and Mrs. F.T.'s doubts (and P.T.'s, if the decision were his) about the widsom of the proposed movement.

As for the Commonwealth, its refusal to participate meaningfully in these hearings (on the basis of Deputy Secretary Howse's letter to me of September 5, 1980) allowed statements such as Mr. Chafetz' to go unrebutted, and robbed the parents of any feeling that there was a firm public policy and commitment in support of successful community programming for their son and others like him. And as noted above, the Commonwealth's failure to provide mediation in this case forfeited a genunine opportunity to address the parents' legitimate concerns in a proper setting and to eliminate, before any hearing on voluntariness, the factors which might well cause someone in P.T.'s position

to choose to remain at Pennhurst.

The Hearing Master believes that there are many attractive features in the proposed community program for P.T. Also, I am unsure, on the basis of some of the parents' remarks, whether they would agree to P.T.'s transfer even if all their concerns were addressed. But the actions and inaction of the County, the Commonwealth, and (to a lesser extent) the residence provider have left the record in this case in such a state that I cannot conclude, because of the legitimate problems identified by his concerned and knowledgeable parents, that P.T., if he were able, would consent to the proposed movement. Therefore, with great regret for the opportunity which has been lost in this case through official indifference and (I suspect) legal posturing, I must order termination of the present plans to transfer P.T. from Pennhurst to a CLA.

5. Relative Habilitative Benefit

In view of my decision on the voluntariness issue, it is unnecessary for me to decide whether the living arrangements and services which have been made ready for P.T. in the community are more beneficial for his habilitation than those being provided at Pennhurst. But I will observe that I was not persuaded, by the uninspired and self-serving description presented at the hearing, that Pennhurst is adequately meeting P.T.'s needs; and I was very disturbed to learn that P.T. is being moved tomorrow from a "modular" unit, which offers some home-like amenities as well as immediate access to the environment, to an older, less appropriate building (Wilson) which lacks these positive features.

For this latter reason, inter alia, I will include in my order a provision which will allow P.T.'s parents to reconsider what they (and he) desire in light of this change in circumstances.

6. Decision and Order

1. The Hearing Master finds and concludes that the proposed transfer of P.T. from Pennhurst to a community living arrangement in Delaware County is not voluntary.

2. The County is ORDERED to terminate the present arrangements for transferring Pennhurst resident P.T. to the community pending further ruling by the United States Supreme Court.

3. The County is further ORDERED to reserve a vacancy in the community living arrangement proposed for P.T. for a period of 90 days, during which time it shall work with P.T. and his parents to resolve their concerns about the proposed community placement. Mr. and Mrs. F.T. are expected to cooperate with the County in this effort.

4. If, during the 90-day period referred to in paragraph 3 above, the County determines that mediation is necessary with regard to disagreements over P.T.'s proposed community placement, the County shall request the Commonwealth to provide such mediation, and the Commonwealth shall do so within seven days of such request.

5. If the measures required by paragraphs 3 and 4 above are successful in resolving the concerns of P.T. and his parents about the proposed community placement within the specified 90-day period, the County shall issue a new notice of proposed community placement. Upon receipt of a copy of same, the Hearing Master will schedule another hearing to determine the

voluntariness and, if necessary, the appropriateness of P.T.'s proposed transfer from Pennhurst to a community living arrangement.

7. Procedures for Appeal

Exceptions to the Hearing Master's report may be taken by any participant in the hearing (i.e., the Pennhurst resident, the resident's parent/guardian and/or certified advocate, the Special Master, the Commonwealth, or the appropriate County). Exceptions must be filed, in writing, not later than ten days after the Hearing Master's report is filed with the Clerk of the Court (regardless of the date copies are received) by mailing or delivering such exceptions to:

Clerk of the Court
United States District Court
Room 2609
United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106.

If the tenth day after filing of the Hearing Master's report is a Saturday, Sunday, or Pennsylvania or Federal legal holiday, then the next day which is not a Saturday, Sunday, or legal holiday is the last day on which exceptions may be filed with the Court. For further instructions, see the procedures attached to the Notice of Hearing, at p. 8-10.

DONE this 8th day of October, 1980.

HEARING MASTER